# HIGH COURT FOR THE STATE OF TELANGANA

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**R.T.No.1 of 2020 and Crl.A.No.293 of 2020**

R.T.No.1 of 2020

Between:
**State of Telangana**

...Petitioner

**and**

**Shaik Babu and others**

...Respondents

CRIMINAL APPEAL No.293 of 2020

Between:
**Shaik Babu and others**

... Appellants

**and**

**State of Telangana**

... Respondent

DATE OF JUDGMENT PRONOUNCED: 28th April, 2023

SUBMITTED FOR APPROVAL:-

**THE HON'BLE SRI JUSTICE P.NAVEEN RAO**
**AND**
**THE HON'BLE SMT. JUSTICE JUVVADI SRIDEVI**

| | | |
|---|---|---|
| 1 | Whether Reporters of Local newspapers may be allowed to see the Judgment? | Yes/No |
| 2 | Whether the copies of judgment may be marked to Law Reporters/Journals | Yes/No |
| 3 | Whether their Lordships wish to see the fair copy of the Judgment? | Yes/No |

**P. NAVEEN RAO, J**

**JUVVADI SRIDEVI, J**

* THE HON'BLE SRI JUSTICE P.NAVEEN RAO
AND
* THE HON'BLE SMT JUSTICE JUVVADI SRIDEVI

**+ R.T.No.1 of 2020 and Crl.A.No.293 of 2020**

**% Date: 28th April, 2023**

R.T.No.1 of 2020

**Between:**

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CRIMINAL APPEAL No.293 of 2020

**Between:**
**Shaik Babu and others**

... Appellants

**and**

**State of Telangana**

... Respondent

**! Counsel for the appellants :** Mr.T.Pradyumna Kumar Reddy, learned senior counsel, appearing for Mr. Mohd. Muzaffer Ullah Khan, learned counsel for the appellants/A1 and A3 and Mr. K.S.Rahul, learned counsel for appellant/A2 in Crl.A.No.293 of 2020.

**^ Counsel for the Respondents :** Sri C.Pratap Reddy, learned Public Prosecutor for respondent in Crl.A.No.293 of 2020.

**>HEAD NOTE:**

**? Cases referred**
1. AIR 1974 SC 799
2. (2003) 8 SCC 551
3. 2023 SCC Online SC 50
4. 2022 SCC Online SC 1396
5. (2021) 5 SCC 626
6. 2023 SCC Online SC 158
7. (2023) 1 SCC 83
8. 2009 SCC Online GUJ 12076
9. Judgment dated 11.12.2020 in Criminal Appeal No.1959 of 2019
10. (2018) 1 SCC 742

11. (1980) 2 SCC 684
12. (1983) 3 SCC 470
13. Decided on 21.02.2019 in Criminal Appeal Nos.1110-1111 of 2015
14. 2019 SCC OnLine TS 2090
15. (2018) 14 SCC 111
16. (2019) 9 SCC 689
17. (2022) 10 SCC 321
18. AIR 1984 Supreme Court 1622
19. 2023 Live Law (SC) 168
20. (2019) 10 SCC 623
21. (2018) 6 SCC 610
22. 2022 LiveLaw Ker 560
23. AIR 2010 SC 1974
24. (2017) 4 SCC 393
25. (2011) 7 SCC 130
26. (2017) 6 SCC 1
27. (2010) 13 SCC 657
28. (2013) 5 SCC 546
29. (2009) 6 SCC 498
30. (2012) 8 SCC 43
31. (2013) 3 SCC 294
32. (1998) 7 SCC 177
33. (2011) 13 SCC 706
34. (2001) 9 SCC 615
35. (2003) 8 SCC 93
36. (2005) 10 SCC 322
37. (2009) 15 SCC 551
38. (2019) 7 SCC 1
39. (2013) 2 SCC 713
40. (2019) 16 SCC 278

**THE HON'BLE SRI JUSTICE P.NAVEEN RAO**
**AND**
**THE HON'BLE SMT. JUSTICE JUVVADI SRIDEVI**

**REFERRED TRIAL No.1 of 2020**
**AND**
**CRIMINAL APPEAL No.293 of 2020**

**COMMON JUDGMENT:** (Per Hon'ble Smt. Justice Juvvadi Sridevi)

Death and if not life, death or life, life and if not death, is the swinging progression of the criminal jurisprudence in India, as far as the capital punishment is concerned. All murders shock the community; but certain murders shock the conscience of the Court as well as the community. The distinguishing aspect of the latter category is that there is shock coupled with extreme revulsion. However, Section 354(3) of the Code of Criminal Procedure, 1973, (for short, 'Cr.P.C.') mandates that when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence. In the words of Justice Krishna Iyer in **Ediga Anamma Vs. State of Andhra Pradesh**[1], the unmistakable shift in the legislative emphasis is that life imprisonment for murder is the rule and capital sentence is an exception to be resorted to, for the

reasons to be stated. It is obvious that the disturbed conscience of the state on the vexed question of legal threat to life by way of death sentence has sought to express itself legislatively, the stream of tendency being towards cautious, partial abolition and a retreat from total retention. It is interesting to note that the requirement for reasons to be stated for awarding any sentence for a term of years found legislative expression in Cr.P.C. for the first time in the year 1973. In the case of death sentence, there must be special reasons. That shows the paradigm shift to life imprisonment as the rule, and death, as the exception.

**2.** The above preliminary discussion on death sentence has special significance as far as the facts of the present case are concerned. Hovering between life and death, the appellants, i.e., Shaik Babu (A1), Shaik Shabuddin (A2) and Shaik Maqdhoom (A3) filed Criminal Appeal No.293 of 2020, under Section 374(2) of Cr.P.C., challenging the judgment, dated 30.01.2020, passed in Special Sessions Case No.117 of 2019 by the Principal Sessions Judge, Adilabad, FAC Special Judge for trial of cases under SCs/STs (POA) Act-cum-V Additional Sessions Judge, Adilabad, Designated as Special Judge for speedy trial and disposal of the subject case; while the trial Court which awarded death penalty to

[1] AIR 1974 SC 799

A1 to A3 submitted the proceedings to this Court vide Referred Trial No.1 of 2020, under Section 366(1) of Cr.P.C., for confirmation of the death sentence imposed against A1 to A3. *Vide* impugned judgment, the trial Court has convicted and sentenced A1 to A3 as under:

**Accused Nos.1 to 3**

| Offence convicted for | Sentence imposed |
|---|---|
| Section 302 r/w 34 of IPC and r/w Section 3(2)(v) of SCs/STs (POA) Amendment Act, 2015 | Death sentence, and to pay fine of Rs.5,000/-, in default, to undergo simple imprisonment for three months. |
| Section 376D r/w 34 of IPC and r/w 3(2)(v) of SCs/STs (POA) Amendment Act, 2015 | Life imprisonment, and to pay fine of Rs.2,000/-, in default, to undergo simple imprisonment for two months. |
| Section 3(1)(w)(i) of SCs/STs (POA) Amendment Act, 2015 | Rigorous imprisonment for three years and to pay fine of Rs.1,000/-, in default, to undergo simple imprisonment for one month. |

**Accused Nos.2 and 3**

| Offence convicted for | Sentence imposed |
|---|---|
| Section 404 r/w 34 of IPC | Rigorous imprisonment for three years and to pay fine of Rs.1,000/- each, in default, to undergo simple imprisonment for one month |

**3.** Since both these cases arise out of the same judgment, they are heard together and are being disposed of by way of this common judgment. Also, in view of the dicta of the Hon'ble Apex Court in **Bhupinder Sharma Vs. State of Himachal Pradesh**[2] wherein it was held that the mandate of not disclosing the

identities of the victims of sexual offence under Section 228A of the IPC ought to be observed in spirit by the Court, we are thus not disclosing the name of the victim and instead referring to her as the "deceased" throughout this common judgment.

**4.** We have heard Mr.T.Pradyumna Kumar Reddy, learned senior counsel, appearing for Mr. Mohd. Muzaffer Ullah Khan, learned counsel for the appellants/A1 and A3 and Mr. K.S.Rahul, learned counsel for A2; and Sri C.Pratap Reddy, learned Public Prosecutor representing the respondent/State in Criminal Appeal No.293 of 2020. Learned Public Prosecutor had also assisted this Court to arrive at an appropriate decision in R.T.No.1 of 2020. We have perused the entire record.

**5.** Briefly stated, the case of the prosecution is thus:

On 24.11.2019, at about 08:00 PM, the *de facto* complainant/Teku Gopi (PW.1) went to Lingapur Police Station and lodged a report stating that on that day, at about 06:30 AM, he along with his wife (deceased) went to Modiguda, Khairguda villages for selling utensils. He dropped the deceased at Yellapatar village for selling bowls and at about 02:00 PM, he returned to Yellapatar village and when he called the deceased on her mobile No.8331065878, it was found switched off. Then he searched for

[2] (2003) 8 SCC 551

the deceased at Yellapatar village and Ramnaik Thanda village and its surroundings, but he did not find the deceased. He did not find the deceased even in the house. On enquiry, his relatives informed him that his wife had not come to their house also. Hence, PW.1 requested the police for taking necessary action.

**6.** Based on the said complaint, PW.24-Sub Inspector of Police registered a case in Crime No.49 of 2019 under the head "Woman Missing", examined PW.1, LW.20-U.Raj Kumar PC-3574 (scribe of the complaint) and recorded their statements, collected the photograph of the missing woman, visited Yellapatar and Ramnaik Thanda villages along with other police personnel and made enquiries about the missing woman. While so, on the next day i.e. 25.11.2019, at about 09:30 AM, PW.1 went to Lingapur Police Station and lodged another complaint under Ex.P2 stating that on 25.11.2019 at about 06:00 AM, while he along with the villagers of Ramnaik Thanda was searching for the deceased, at about 09:00 AM, some of the villagers informed him that they saw a dead body in a pool of blood; on that information, he went to the spot and on observation, found the dead body as that of his wife. He also stated in the said complaint that the blouse of his wife was open, saree was pushed above the knees and legs were widened. He also stated that on the previous night, while he and his relatives

were enquiring, he came to know through the villagers that A1 to A3 were not present in the village and thus expressed suspicion against A1 to A3 that they might have committed rape and murder of his wife.

**7.** Based on the Ex.P2 complaint, PW.24 altered the section of law to Sections 376D, 302 r/w 34 of IPC and Section 3(2)(v) of SCs/STs (POA) Act, 1989. In view of the gravity of the offence and consequent upon his appointment as Investigation Officer, PW.25-Sub Divisional Police Officer took up further investigation of the case, visited the scene of offence i.e., outskirts of Yellapatar village, observed the dead body, got photographed the dead body and also the scene of offence by PW.9-photographer, examined the relatives of the deceased, recorded their statements, conducted inquest panchanama over the dead body of the deceased in the presence of PW.12-Rathod Vasanth Rao, LW.24-Rathod Sheela and LW.26-jadhav Tukaram, drafted rough sketch of the scene of offence in the presence of PW.12 and LW.24 and seized a bag containing 23 items i.e. 6 basins, weighing scale with 50 grams iron bar, 23 grams bronze bar and 10 grams bronze bar, six steel bowls, six steel tiffin boxes, eight aluminium tumblers, two steel tumblers, nine steel tea glasses, one steel box, two aluminium vessels, two aluminium kadas, one steel jaali plate,

plastic box containing multi colour beeds, six steel spoons, steel tea craft, five tea strainers, two steel strainers, one thick pink colour sweater, one cover containing hairs, one small air pump, one scarf, nylon bag containing sticker packets, boxes, balloon packets and hair pins, empty plastic tin, empty cement bag, chappal, piece of blue colour bangle, red colour cloth, blood stained earth and control earth.

**8.** On referral by the Investigation Officer, PW.18-Dr.Upendra Jadhav and LW.34-Dr. Rathnamala, Medical Officers of Government Hospital, Utnoor, conducted Postmortem Examination over the dead body of the deceased and preserved vaginal swabs. The Investigation Officer further seized the blood stained clothes of the deceased i.e. saree, blouse, torn panty piece under a cover of panchanama in the presence of PWs.13 and 14. Thereafter, the Investigation Officer obtained caste certificate of the deceased from the Tahsildhar concerned, according to which, the deceased belonged to SC-Beda Budugajangam community.

**9.** On 27.11.2019, at about 09.00 AM, a team consisting of LW.40-K.Venugopal HC-604, LW.41-T.Santhosh PC-1347 and LW.42-Mohammad Ifthekar Ali PC-3173 apprehended A1 to A3 at Adilabad cross roads of Asifabad and on their production, the

Investigation Officer interrogated them in the presence of PW.15-Arram Nithin Kumar and LW.30-Mohammad Yunis, wherein, A1 to A3 have confessed to have committed the offence. Pursuant to their confession, one blood stained knife used in the commission of offence, blood stained jeans pant, shirt, underwear of A1 were seized from A1; one mobile of ITEL company of the deceased, blood stained pant, shirt, underwear were seized from A2; and Rs.200/-, blood stained pant, shirt and underwear were seized from A3, under cover of three different panchanamas. Thereafter, the Investigation Officer affected the arrest of A1 to A3, got conducted their potency test by PW.19-Dr.Vidyasagar, Medical Officer of Asifabad Government Hospital, who certified that there was nothing to suggest that A1 to A3 were incapable of performing sexual act. Later, A1 to A3 were produced before the Court concerned for judicial remand. Subsequently, the Investigation Officer collected the DVD of confession of A1 to A3 and seizure of articles from the accused from LW.22-Shaik Saleem who recorded the confession and seizure panchanama.

**10.** Subsequently, the Investigation Officer obtained the caste certificate of A1 to A3 from PW.17-Tahsildhar, according to which, A1 to A3 belonged to Shaik BC-E community. On 28.11.2019, the Investigation Officer visited Ramnaik Thanda, examined the

witnesses, recorded their statements, obtained preliminary Postmortem Examination report from the Medical Officers concerned and sent the material objects to Forensic Science Laboratory for examination and report. Later, on 01.12.2019, A1 to A3 were taken for police custody for further investigation, they were sent to Forensic Science Laboratory, Hyderabad, where blood samples of A1 to A3 for DNA profile comparison were taken. On the requisition issued by the Investigation Officer, PW.22-N.Srinivasa Rao, Nodal Officer of BSNL, Hyderabad, issued certified copies of CDRs and CAF with certificate, according to which, SIM Card 8331065878, which was in the name of PW.11-Kadam Krishna, was used by the deceased in her mobile and same were tallied with mobile that was seized from A2. The Investigation Officer also collected the CDR and CAF details of SIM card used by PW.1/*de facto* complainant in his mobile. On 13.12.2019, the Investigation Officer received FSL Report and also DNA report, which established that the seminal stains on the saree of the deceased were matching with DNA profile of A1 and A2 and the DNA profile of source on glass slides is matching with that of A3. Later, PW.18-Dr.Upender Jadhav and LW.34-Dr.Rathnamala, who conducted postmortem examination over the dead body of the deceased, issued Final Opinion stating that the cause of death of

the deceased was '*due to shock and hemorrhage as a result of cut throat injury*' and there is evidence of recent vaginal sexual intercourse.

**11.** As per the prosecution, the investigation established that PW.1/*de facto* complainant is the husband of the deceased; they belonged to SC-Beda Budagajangam community; they are eking out their livelihood by selling utensils/bowls in the villages; on 24.11.2019, PW.1 left his wife at Yellapatar village and went away; while the deceased was going towards Ramnaik Thanda by walk, A1 to A3, who belonged to BC-E Shaik community, followed the deceased and when she reached the fields of LW.19-Jadav Gnaneshwar, dragged her forcibly to the side of the road and when A1 attempted to commit rape on her, the deceased resisted and tried to escape; there upon, A1 to A3 dragged the deceased into the bushes, committed rape on her forcibly, one by one, by cooperating with each other, and after committing rape, A1 to A3, apprehending danger to their lives in case of the deceased revealing the matter to others, decided to kill her and accordingly, A1 attacked the deceased with a knife brought along with him and when he tried to stab her, she resisted; in that process, the deceased suffered stab injuries on her both hands; then A2 and A3 caught hold the hands and legs of the deceased, thereupon A1 cut

the throat of the deceased with knife and caused her instantaneous death; thereafter, A2 had taken away the mobile of the deceased while A3 had taken away Rs.200/- of the deceased and all of them fled away from that place; thus, A1 to A3 committed offences punishable under Sections 376D, 302, 404 read with 34 of IPC and Section 3(1)(w-1) and Section 3(2)(v) of SC/ST (POA) Act, 1989.

**12.** The trial Court, which was designated as a Special Court for speedy trial and disposal of the subject case *vide* G.O.Rt.No.647, dated 11.12.2019, has taken the charge sheet on file for the offences under Sections 376D, 302, 404 read with 34 of IPC and Section 3(1)(w-1) and Section 3(2)(v) of SC/ST (POA) Act, 1989 against A1 to A3, *vide* Special Sessions Case No.117 of 2019.

**13.** On appearance of A1 to A3 before the trial Court, they were furnished with the copies of documents under section 207 of Cr.P.C. and on hearing both sides, the trial Court framed charges for the offences punishable under sections 376D, 302 read with 34 of IPC and Section 3(1)(w-1) and Section 3(2)(v) of SCs/STs (POA) Act, 1989, against A1 to A3 and also Section 404 read with 34 of IPC against A2 and A3, read over and explained the contents

of the charges to them in vernacular language for which, they pleaded not guilty and claimed to be tried.

**14.** In order to bring home the guilt of accused, the prosecution examined PWs.1 to 25 and got marked Exs.P.1 to P.32, besides MOs.1 to 21, which are detailed below in tabular format.

**Oral evidence adduced by the prosecution**

| | |
|---|---|
| PW.1/Teku Gopi | He is the de-facto complainant. |
| PW.2/Teku Gangaram | He is a relative of the deceased and a circumstantial witness. |
| PW.3/Rathod Shravan | He is a circumstantial witness. |
| PW.4/Ade Madhukar | He is another circumstantial witness, who was working in the land beside the scene of offence on the date of offence. |
| PW.5/Athram Laxman | He is another circumstantial witness who saw A1 to A3 following the deceased before the offence. |
| PW.6/Jadhav Ganesh | He is a circumstantial witness, who is a owner of kirana shop who observed the clothes of A1 to A3 having blood stains when they came to his shop. |
| PW.7/Shaik Shamshoddin<br>And<br>PW.8/Varkade Datha | They are circumstantial witnesses, who disclosed that A1 to A3 were not present since afternoon of 24.11.2019 in the village. |
| PW.9/Athram Madhav Rao | He is the photographer who took the photographs of the dead body of the deceased. |
| PW.10/Shaik Saleem | He is the videographer who videographed the confessional statement of A1 to A3. |
| PW.11/Kadem Krishna | He is the brother by courtesy to the deceased, who brought SIM No.8331065878 and gave to the deceased for usage. |
| PW.12/Rathod Vasanth Rao | He is a panch witness for inquest panchanama, crime details form, rough sketch and scene of offence panchanama. |
| PW.13/Kallem Thirupathi<br>And<br>PW.14/Patri Srinivas | They are the panch witnesses for seizure of blood stained clothes of the deceased at Government Hospital, Utnoor. |
| PW.15/Arram Nithin Kumar | He is a panch witness for confession and seizure panchanama of A1 to A3. |
| PW.16/J. Narayana | He is the Tahsildar who issued Caste Certificate of |

| | |
|---|---|
| | the deceased. |
| PW.17/M.Madhukar | He is the Tahsildar, who issued Caste Certificates of A1 to A3. |
| PW.18/Dr.Upender Jadhav | He is the doctor who conducted autopsy over the dead body of the deceased and issued Preliminary PME Report and Final Opinion. |
| PW.19/Dr.Vidyasagar | He is the doctor who conducted Potency Test of A1 to A3 and issued Report. |
| PW.20/Dr.Shaik Haseena Parvin | She is Assistant Director of Serology Department who conducted chemical examination and issued Serology Report. |
| PW.21/Dr.G.Pandu | He is the Assistant Director of DNA Department who conducted chemical examination (DNA profile comparison) and issued DNA Report with Electropherogram. |
| PW.22/N.Srinivas Rao | He is the Sub-Divisional Engineer of BSNL who issued certified copies of CDRs and CAF of SIM No.8331065878. |
| PW.23/Pawar Santhosh | He is a police constable who was a member of ID party team, who apprehended A1 to A3. |
| PW.24/N.Venkatesh | He is the SI of Police, who is the first investigation officer and who issued FIR in this case. |
| PW.25/A.Sathyanarayana | He is the investigation officer, who completed the investigation and laid charge-sheet before the Court concerned. |

## Documentary Evidence adduced by the prosecution

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|---|---|
| Ex.P1 | Complaint, dated 24.11.2019 lodged by PW.1 |
| Ex.P2 | Complaint, dated 25.11.2019 lodged by PW.1 |
| Ex.P3 | 13 photographs |
| Ex.P4 | Corresponding DVD |
| Ex.P5 | Certificate under Section 65B of Evidence Act |
| Ex.P6 | DVD |
| Ex.P7 | Certificate under Section 65B of Evidence Act |
| Ex.P8 | Inquest Panchanama |
| Ex.P9 | CDF Panchanama |
| Ex.P10 | Rough sketch |
| Ex.P11 | Seizure panchanama at scene of offence |
| Ex.P12 | Seizure panchanama of blood stained clothes of the deceased |
| Ex.P13 | Portion of confession-cum-seizure panchanama of PW.1 |
| Ex.P14 | Portion of confession-cum-seizure panchanama of PW.2 |
| Ex.P15 | Portion of confession-cum-seizure panchanama of PW.3 |
| Ex.P16 | Caste verification report of the deceased |
| Ex.P17 | Caste verification report of A1 to A3. |

| | |
|---|---|
| Ex.P18 | Postmortem Examination Report |
| Ex.P19 | Final opinion |
| Ex.P20 | Potency Certificate of A1 |
| Ex.P21 | Potency Certificate of A2 |
| Ex.P22 | Potency Certificate of A3 |
| Ex.P23 | Serology Report |
| Ex.P24 | DNA report with Electropherogram |
| Ex.P25 | Customer Application Form of PW.11 |
| Ex.P26 | Certified copy of CDR of Mobile No.8331065878 |
| Ex.P27 | Certification under Section 65-B(4)(c) of Evidence Act |
| Ex.P28 | First Information Report |
| Ex.P29 | Section Alteration Memo |
| Ex.P30 | Memorandum issued by S.P., Adilabad |
| Ex.P31 | Attested copy of letter of advice |
| Ex.P32 | Attested copy of letter of advice |

**Material Objects marked in this case**

| | |
|---|---|
| MO.1 | Black and red colour ITEL company mobile |
| MO.2 | Blood stained brown colour saree |
| MO.3 | Blood stained rose colour blouse |
| MO.4 | Bangle piece |
| MO.5 | One white chappal |
| MO.6 | Red colour cloth |
| MO.7 | Control earth |
| MO.8 | Blood stained earth |
| MO.9 | One bag containing 22 items |
| MO.10 | Blood stained white colour torn panty piece |
| MO.11 | Knife |
| MO.12 | Blood stained pant |
| MO.13 | Blood stained shirt |
| MO.14 | Underwear |
| MO.15 | Blood stained yellow colour shirt |
| MO.16 | Blood stained brown colour pant |
| MO.17 | Black and pink colour dots underwear |
| MO.18 | Blood stained white colour lining shirt |
| MO.19 | Blood stained light green colour pant |
| MO.20 | Brown colour full underwear |
| MO.21 | Cash of Rs.200/- |

**15.** After the closure of prosecution evidence, when A1 to A3 were examined under Section 313 of Cr.P.C., with reference to the incriminating material appearing against them, they denied the

same. No evidence, either oral or documentary, has been adduced on behalf of A1 to A3.

**16.** The trial Court, after adverting to the various contentions raised on behalf of both sides and after elaborately discussing the evidence on record, held that prosecution proved the guilt of A1 to A3 beyond all or any reasonable doubt for the offences they were charged with and awarded capital punishment to A1 to A3, holding that the crime committed by them satisfies the test of 'rarest of rare' case. Aggrieved by the same, A1 to A3 preferred Criminal Appeal No.293 of 2020 and the trial Court submitted the matter to this Court *vide* R.T.No.1 of 2020, for confirmation of death sentence.

**17.** Mr. T.Pradyumna Kumar Reddy, learned senior counsel, has not only argued on the merits of the case, but has also argued with regard to the sentence imposed by the trial court. As far as the merits of the case are concerned, Mr. T.Pradyumna Kumar Reddy vehemently submitted that the trial Court committed a serious error in holding that A1 to A3 are guilty of the offence of committing rape and murder of the deceased. He would submit that in the course of trial, the prosecution failed to lead any credible evidence to connect A1 to A3 with the alleged crime. He

would submit that the trial Court ought not to have accepted the evidence of PWs.2 to 8, who are interested witnesses. The Court below ought to have discarded the evidence of discovery of weapon and blood stained clothes of A1 to A3, as the prosecution has not been able to prove the authorship of concealment. Relying on the judgments of the Hon'ble Apex Court in **Boby Vs. State of Kerala**[3] and **Ramanand alias Nandlal Bharti Vs. State of Uttar Pradesh**[4], learned senior counsel would submit that the whole prosecution case is based on circumstantial evidence and in a case of circumstantial evidence, the prosecution is required to establish the continuity in the links of the chain of the circumstances, so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. He would further submit that there are material contradictions in the evidence of PWs.12 to 15, who are witnesses to inquest, seizure and confessional panchanamas. Further, the confession allegedly made by A1 to A3 with regard to the commission of the subject offence is hit by Section 26 of Evidence Act, which mandates that no confession by the accused whilst in the custody of police shall be proved, unless it is made in the

[3] 2023 SCC Online SC 50
[4] 2022 SCC Online SC 1396

immediate presence of a Magistrate. Further, Ex.P23-Serology Report and Ex.P.24-DNA report are not connecting A1 to A3 with the subject offence and hence, the same cannot be relied upon. Relying on the judgment of the Hon'ble Apex Court in **Shivaji Chintappa Patil Vs. State of Maharashtra**[5], learned senior counsel would submit that though false explanation or non-explanation by an accused in his/her statement under Section 313 of Cr.P.C. can be used as an additional circumstance when the prosecution has proved the chain of circumstances leading to no other conclusion than that of the guilt of the accused, however, it cannot be used as a link to complete the chain of circumstances. He would further submit that the prosecution failed to establish that Rs.200/- said to have been recovered from A3 belonged to the deceased. Learned senior counsel further submitted that since PW.20-FSL Analyst admitted in her evidence that whether the semen found on the material objects deposed by her was a mixed one or pertaining to a single person and blood grouping was also not done, her evidence has to be discarded. A1 to A3 appearing at the cross roads in the same blood stained clothes nearly after three days of the offence does not sound credible. Mere detection of blood on the clothes of A1 to A3 is not conclusive proof to connect A1 to A3 with the subject offence. Further, relying on the

[5] (2021) 5 SCC 626

decision of the Hon'ble Apex Court in **Ram Gopal S/o. Masharam Vs. State of Madhya Pradesh**[6], the learned senior counsel would submit that the 'last seen theory' is not proved in this case. The only observation made was that the deceased went towards Ramnaik Thanda and A1 to A3 also went towards Ramnaik Thanda, but however, the deceased and A1 to A3 were not seen going together towards Ramnaik Thanda by any of the prosecution witness. Therefore, since the deceased and A1 to A3 were not spotted together, the 'last seen theory' is not proved and thus, the onus still remains upon the prosecution to establish the link and does not shift to A1 to A3. Further, placing reliance on the judgment of the Hon'ble Apex Court in **Rahul Vs. State of Delhi**[7], a decision of Hon'ble Gujarat High Court in **Premjibhai Bachubhai Khasiya Vs. State of Gujarat and another**[8] and a decision of the Hon'ble Karnataka High Court in **Sri Paramesha Vs. State of Karnataka**[9], learned senior counsel contended that DNA evidence is in the nature of opinion evidence as envisaged under Section 45 of Evidence Act and like any other opinion evidence, its probative value varies from case to case and that if the DNA report is the sole piece of evidence, even if it is positive,

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[6] 2023 SCC Online SC 158
[7] (2023) 1 SCC 83
[8] 2009 SCC Online GUJ 12076
[9] Judgment dated 11.12.2020 in Criminal Appeal No.1959 of 2019

it cannot conclusively fix the identity of the miscreant, but, if the report is negative, it would conclusively exonerate the accused from the involvement or charge and that it is highly unsafe to rely upon the sole DNA test to convict the person on the basis of the said test. He would also contend that no permission was obtained from A1 to A3 in the instant case to collect blood samples from them to conduct DNA test. Relying on the decision of the Hon'ble Apex Court in **Asharfi Vs. State of Uttar Pradesh**[10], learned senior counsel argued that Section 3(2)(v) of SC/ST (POA) Act can only be pressed into service only if it is proved that the rape has been committed on the ground that the deceased belonged to Scheduled Caste community and in the absence of evidence proving intention of A1 to A3 in committing the offence upon the deceased only because she belonged to Scheduled Caste community, their conviction under the said penal provision cannot be sustained. Lastly, learned senior counsel would submit that howsoever unnatural one may find the conduct of A1 to A3 after the alleged crime, the same, by itself, is not sufficient to convict A1 to A3 for an offence like rape coupled with murder. Contending so, learned senior counsel prayed that the impugned judgment of conviction and death penalty may be set aside and A1 to A3 may be acquitted of the charge of murder.

[10] (2018) 1 SCC 742

**18.** As regards the imposition of capital punishment against A1 to A3, the learned senior counsel, relying on the case of **Bachan Singh Vs. State of Punjab**[11], argued that imposition of life imprisonment is the rule, and the imposition of death penalty is an exception. According to **Bachan Singh**'s case (11 supra), capital punishment can be imposed only in cases, which are considered to be 'rarest of the rare'. However, the present case does not fall within the said category. While selecting a sentence where various sentences are available and while imposing a sentence, the Court cannot confine its consideration 'principally or merely' to the circumstances of the crime and in fact, the Court is required to consider both the circumstances of the crime and the position of the criminal. While considering both these circumstances, the trial Court is required to weigh "the aggravating and the mitigating circumstances" of the case. Placing reliance on the case of **Machhi Singh v. State of Punjab**[12], learned senior counsel would contend that the test laid down in the said case, viz., (a) manner of commission of murder, (b) motive for commission of murder, (c) if the nature of the crime is anti-social or socially abhorrent, (d) the magnitude of the crime, and (e) to consider the personality of victim of murder, needs to be applied to the present

[11] (1980) 2 SCC 684

case. According to the learned senior counsel, all the above five factors have to be seen holistically, rather than selecting one of them and by overemphasizing its importance. Learned senior counsel further contended that although it is unfortunate that a helpless woman was allegedly raped by A1 to A3 one after the other and murdered, the act is not 'an extremely brutal' or 'grotesque' or 'abhorrent' or 'diabolical' or 'revolting' or 'committed in a dastardly manner which would arouse intense or extreme indignation of the community'. Furthermore, the alleged crime is neither anti-social, nor socially abhorrent. Similarly, the magnitude of the crime is limited to an individual, and does not involve the elimination of a family, or a large number of persons of a particular community or locality. Therefore, the magnitude of the crime is a limited one. Thus, even if one were to consider the aggravating factors of the case, even then, the subject case does not fall within the ambit of being 'rarest of the rare' case. Moreover, A1 to A3 did not pre-plan the alleged rape or murder of the deceased. Thus, according to the learned senior counsel, these are mitigating factors in favour of the A1 to A3.

**19.** *Per contra*, Mr. C.Pratap Reddy, learned Public Prosecutor has raised counter-arguments, both with regard to the merits of

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[12] (1983) 3 SCC 470

the case and with regard to the capital punishment imposed upon A1 to A3. As regards the merits of the case, learned Public Prosecutor would contend that the discrepancies pointed out by the learned senior counsel appearing for A1 to A3 with regard to the evidence adduced by the prosecution are minor discrepancies, which, in any event, are not fatal to the case of prosecution. The prosecution has a watertight case against A1 to A3. There is ample evidence on record which establishes that A1 to A3, with a premeditated mind of committing rape on the deceased, followed her till she was found alone. After that, they dragged her to the road side forcibly and attempted to commit rape on her, but when she resisted, A1 to A3 dragged her into the nearby bushes and committed rape on her forcibly, one after the other, by cooperating with each other, by closing the mouth of deceased and also holding her hands tightly. The medical evidence on record reveals that the deceased suffered several external injuries such as abrasions, contusion, nail scratch marks on several parts of her body and that her both side ribs were fractured. Further, in order to save their skin, the accused brutally murdered the deceased by cutting her throat with a knife. There is also evidence on record to show that after commission of all the above atrocities on the deceased, A2 had taken away her mobile phone and A3 had taken

away cash of Rs.200/- from her. There is medical evidence and other oral and documentary evidence to substantiate that the subject death was caused by A1 to A3 and none else. A1 to A3 were apprehended on 27.11.2019 and they confessed the commission of the subject offences. Pursuant to the confession A1 to A3, MOs.11 to 21 were seized from their possession in the presence of panch witnesses. The investigation officer, during the course of investigation, also seized MOs.1 to 10 from the crime scene. There is Serology Report under Ex.P23 and DNA Report with Electropherogram under Ex.P24, apart from other oral and documentary evidence, which connects A1 to A3 with the subject death of the deceased. The confession made by A1 to A3 and recovery of material objects pursuant to their confession clinchingly prove the guilt of A1 to A3 beyond all reasonable doubt of the offences with which they were charged.

**20.** As far as the imposition of the capital punishment is concerned, learned Public Prosecutor has vehemently argued that an innocent and helpless woman was raped by A1 to A3, one after the other, and was brutally murdered by cutting her throat apprehending that she would disclose the incident to others. A1 to A3 have committed the crime in order to satisfy their lust. A brutal murder of a woman after subjecting her to gang rape shocks

the conscience of the Court as well as the society at large. Therefore, the case falls within the category of the 'rarest of the rare' case. Hence, the harshest punishment has rightly been imposed by the trial Court. In the rarest of the rare cases, the punishment should be so deterrent as to set an example for others in order to deter them from committing a similar offence. A1 to A3 deserves no mercy from the Court. The trial Court was justified in imposing the capital punishment upon A1 to A3. According to the learned Public Prosecutor, before the Court proceed to make a choice whether to award death sentence or life imprisonment, the Court is to draw up a balance-sheet of aggravating and mitigating circumstances attending to the commission of the offence and then strike a balance between those aggravating and mitigating circumstances. Two questions are to be asked and answered: (i) is there something uncommon about the crimes which regard the sentence of imprisonment for life inadequate; (ii) Whether there is no alternative punishment suitable, except death sentence. Where a crime is committed with extreme brutality and the collective conscience of the society is shocked, Courts must award death penalty, irrespective of their personal opinion as regards desirability of death penalty. By not imposing a death sentence in such cases, the Courts may do injustice to the society at large.

Contending so, learned Public Prosecutor prayed to confirm the capital punishment imposed against A1 to A3. In support of his submissions, the learned Public Prosecutor had relied on the following decisions.

1. **Dattatraya @ Datta Ambo Rokade Vs. State of Maharashtra**[13]
2. **Polepaka Praveen Vs. State of Telangana**[14]
3. **State of Uttar Pradesh Vs. Mahipal**[15]
4. **Ravishankar @ Baba Vishwakarma Vs. State of Madhya Pradesh**[16]
5. **Pappu Vs. State of Uttar Pradesh**[17]

**21.** We have given our thoughtful consideration to the submission of both sides, perused the impugned judgment and we have examined the record.

**22.** There is no dispute that the whole prosecution case is based on circumstantial evidence. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved, and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. The question whether

[13] Decided on 21.02.2019 in Criminal Appeal Nos.1110-1111 of 2015
[14] 2019 SCC OnLine TS 2090
[15] (2018) 14 SCC 111
[16] (2019) 9 SCC 689
[17] (2022) 10 SCC 321

chain of circumstances unerringly established the guilt of the accused needs careful consideration. The proof of a case based on circumstantial evidence, which are usually called 'five golden principles', have been stated by the Apex Court in **Sharad Birdhi Chand Sarda Vs. State of Maharashtra**[18], which reads as follows:-

> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established, as distinguished from 'may be' established.*
>
> *(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.*
>
> *(3) The circumstances should be of a conclusive nature and tendency;*
>
> *(4) They should exclude every possible hypothesis except the one to be proved; and*
>
> *(5) There must be a chain of evidence complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*

**23.** As regards the question as to whether the subject death of the deceased is homicidal, there is oral evidence of PW.18-doctor who conducted Post-mortem Examination over the dead body of the deceased. He deposed that on 25.11.2019, on the requisition of SDPO, Asifabad, he along with Dr. Rathnamala conducted post-

[18] AIR 1984 Supreme Court 1622

mortem over the dead body of deceased, during which they found the following ante-mortem external injuries:

1. *Eye was partially opened;*
2. *Lips cyanosed, tongue protruded out, tongue bite mark measuring 4 x 1 cm;*
3. *Abrasion of 5 x 2 cm over chin;*
4. *Incised injury of 6 x 3 cm deep over front of neck above the thyroid cartilage with underlying trachea and right carotid artery cut open and blood clot present over the neck;*
5. *Contusion of 8 x 4 cm over upper chest in the sternal region;*
6. *Multiple abrasions of 3 x 1 cm., over jaw;*
7. *Multiple nail scratch mark of 2 x 0.5 cm., over upper chest;*
8. *Incised injury of 8 x 1 cm over right palm;*
9. *Incised injury of 4 x 2 cm., over left index finger;*
10. *Abrasion of 5 x 2 cm., over back of chest;*
11. *Abrasion of 2 x 1 cm., over right and left knee;*
12. *Fracture of 3rd, 4th and 5th right side ribs;*
13. *Fracture of 6th and 7th left side ribs; and*
14. *Hyoid bone intact.*

PW.18 further deposed that they preserved vaginal smear and swab for semen and spermatozoa and DNA profile and handed over the same to escort constable for its deposit before FSL, Hyderabad for analysis; that they issued Ex.P18-preliminary post-mortem examination report; that the approximate time of death is 24 to 28 hours prior to post-mortem; that after receipt of FSL and DNA report, they issued Ex.P.19-Final opinion, according to which, the cause of death was *'shock and hemorrhage as a result of cut throat injury'.* PW.18 further deposed that there was evidence of recent vaginal sexual intercourse. PW.18 also deposed that the above injuries were possible with a sharp edged weapon and the fractures of right and left side ribs were possible if a person is

attacked forcibly. In addition to the oral evidence of PW.18 and Exs.P18 and P19, the prosecution relied upon uncontroverted Ex.P8-Inquest Panchanama, wherein, in column No.IX, it was opined that the '*death was due to cutting throat with knife and committing rape*'. We also opine that the injuries found on the dead body of the deceased as possible with an object like MO.11-knife and when a person was attacked forcibly. The nature of injuries found on the dead body of the deceased clearly rules out any natural, accidental or suicidal death. There cannot be any better opinion than the one expressed by PW.18 as to the cause of death of the deceased. From all the above, we conclude that the death of the deceased is homicidal.

**24.** Now the question that requires answer is as to whether the prosecution was able to prove beyond all or any reasonable doubt that A1 to A3 have caused the subject death of the deceased after having committed rape on her, one after the other. To answer the said question, we need to analyse the evidence on record.

**25.** It is the case of prosecution that the deceased used to sell utensils by going in the streets; on 24.11.2019, while the deceased was proceeding towards Ramnaik Thanda by walk on her work, A1 to A3, with an evil eye on her, followed her and when she

reached the fields of one Jadhav Gnaneshwar at the outskirts of Ramnaik Thanda, they dragged her to the road side and when A1 attempted to commit rape on her, she resisted and tried to escape from them and as such, A1 to A3 dragged her into the nearby bushes and committed rape on her, one by one, by cooperating with each other; thereafter, the accused, suspecting that they would be imprisoned if she discloses the matter to anybody, killed her by slitting her throat with MO.11/knife; thereafter, A2 had taken away the mobile phone of deceased, while A3 had taken away cash of Rs.200/- of deceased. As already stated *supra*, in order to prove its case, the prosecution has examined as many as 25 witnesses and marked as many as 32 documents and 21 case properties.

**26.** PW.1-Teku Gopi is the husband of the deceased. He deposed that they belong to SC Beda Budagajangam community. On 24.11.2019, at about 6:30 AM, he dropped his wife (deceased) at Yellapatar village for selling utensils and at about 02:00 PM, when he called his wife on her mobile No.8331065878, it was found switched off. As such, he enquired about her in Yellapatar village, Ramnaik Thanda and surrounding villages, but could not trace her whereabouts. Then, he along with his relatives went to Lingapur Police Station and lodged Ex.P1 report. On the next day,

while they were again searching for his wife, at about 06:00 AM, the villagers of Yellapatar expressed suspicion over A1 to A3 for missing of his wife and at about 09:00 AM, some of the villagers of Ramnaik Thanda informed them about their finding a dead body on the right side of road. Thereupon, he went there and identified the dead body as that of his wife. The blouse of his wife was opened, saree was pushed up to knee level and legs were widened. He also noticed knife injuries on neck and both hands and her throat was also cut and on seeing the dead body, it appeared that she was raped and murdered. Thereupon, he again went to Lingapur Police Station on 25.11.2019 and lodged Ex.P.2 report and based on the information given by the villagers, he mentioned in Ex.P.2 report that A1 to A3 were in the habit of misbehaving with women and later compromising the dispute by paying money to victims. PW.1 further deposed that through the villagers of Ramnaik Thanda, he came to know that A1 to A3 were even absconding from the village from 04:00 PM on 24.11.2019, i.e., the date of offence and hence, he suspected that A1 to A3 might have raped and killed his wife. He also deposed that the utensils bag was at the dead body, but the mobile of his wife was missing and on his identification in the Court, the mobile phone, blood stained brown colour saree and Rose colour blouse of his wife were marked as

MOs.1 to 3 respectively. Though PW.1 was cross-examined at length, nothing was elicited to discredit his testimony in his examination-in-chief.

**27.** PW.2-Teku Gangaram is the paternal uncle of PW.1. He deposed that on 24.11.2019 at about 06:00 PM, on coming to know about the missing of the deceased, he along with others went to Lingapur Police Station, met PW.1 at about 08:00 PM, and from there, they along with police went in search of the deceased, but they could not trace her out on that day. On the next day, while they were again searching for the deceased, at about 09:00 AM, the villagers of Ramnaik Thanda informed them about their finding a dead body of a woman in the bushes beside the road in between Ramnaik Thanda and Yellapatar villages. On such information, they went there, identified the dead body as that of the deceased. PW.2 further deposed that the blouse on the dead body was opened, saree was disrobed up to knee level, legs were widened, there were injuries on neck, both hands and her throat was also cut. PW.2 also deposed that on observation of scene, it appeared that the deceased was raped and murdered. As the villagers informed him that three Muslim persons were not found in the village, he suspected that those three persons might have

committed the subject offences. PW.2 withstood his cross-examination and his evidence has remained unshaken.

**28.** PW.3-Rathod Shravan, who is alleged to have firstly seen the dead body of deceased, has deposed that on 24.11.2019 at about 08:30 PM, PW.1, his relatives and police came to their village Ramnaik Thanda in search of the wife of PW.1 and he too followed them, but they could not find the deceased. As such, they continued searching for her on the next day, i.e., on 25.11.2019, during which, he found one dead body in the bushes on the right side of road leading to Yellapatar village. Immediately, he informed the same to the villagers, PW.1 and his relatives, who were also searching in the places nearby and the relatives of PW.1 identified the dead body as that of the deceased. According to PW.3, he too noticed that the throat of deceased was cut, legs were in widened position, bleeding injuries were found on her hands, clothes were also drenched and on observation of the scene, it appeared that the deceased was raped and murdered. He further deposed that A1 to A3 were absconding from the village from the afternoon of 24.11.2019 and as such, they suspected that A1 to A3 might have raped and murdered the deceased. This witness also withstood in his cross-examination.

**29.** PW.4-Ade Madhukar, who was allegedly working in the adjacent field on the date of the subject offence, deposed in his evidence that on 24.11.2019, while he along with his wife and two labourers were picking up cotton in their fields, at about 10:30 AM, they heard shrieks of one lady, as such they went towards that side, but could not find anybody and hence they returned to their work spot. This witness had categorically deposed in his evidence that at that time, they saw A1 to A3 going from Ramnaik Thanda to Yellapatar village. Later at about 06:00 or 07:00 PM, PW.1 came to their village, enquired about his wife by stating that she was missing. On the next day i.e., on 25.11.2019 at about 09:00 AM, he came to know through the villagers that a female dead body was found in the cotton fields of Jadhav Gnaneshwar. Then he went to the scene of offence and saw the dead body of the deceased. This witness also categorically deposed in his evidence that the blouse of the dead body was opened, saree was disrobed up to knees, legs were widened, throat was also cut and bleeding injuries were found on both the hands. He further deposed that on seeing the dead body, it appeared that the said person was raped and murdered. On recollection of memory, PW.4 confirmed that the sounds heard by him on the previous day came from the scene of offence. He too suspected that A1 to A3 might have committed

the offence, as he saw them going from Ramnaik Thanda to Yellapatar village. Nothing was elicited to discredit the testimony of this witness in his cross-examination.

**30.** PW.5-Athram Laxman, who alleged to have seen A1 to A3 following the deceased, has supported the case of prosecution and deposed that on one Sunday, at about 09:00 AM, while he was crossing Yellapatar village on his motorcycle along with his sister Thirthana Bai, he saw A1 to A3 going towards Ramnaik Thanda by walk, and after crossing two fields, he noticed that the deceased was also walking towards Ramnaik Thanda by carrying utensils bag on her head. He further deposed that he returned to village at about 05:00 PM and at about 08:30 PM, PW.1 along with police came to their village and enquired the villagers about the wife of PW.1, who was missing from afternoon. On the next day at about 10:00 AM, he came to know through the villagers that the dead body of a lady was found, immediately he went to the spot and identified it as that of the deceased. This witness too noticed that the blouse of the dead body was opened, saree was removed up to knees, both the legs were in 'V' shape, the throat was cut and bleeding injuries were there on both the hands and on observation of the same, it appeared that the deceased was raped and murdered. PW.5 has also deposed that he too suspected that A1

to A3 might have committed the offence, as they were absconding from the village from the date of offence. Nothing contra was elicited from this witness from what he has deposed in his examination-in-chief.

**31.** PW.6-Jadhav Ganesh deposed in his evidence that on 24.11.2019 at about 11:30 AM, when he was at his kirana shop, A1 to A3 went to his shop, sat on the bench, later A2 took water from the pot, drank it. At that time he observed some blood stains on the clothes of A1 to A3. Later at about 04:00 p.m., PW.1 came to his shop and enquired about the missing of his wife. On 25.11.2019 at about 09:30 AM, he came to know that the dead body of the deceased was found near the cotton fields of one Jadhav Gnaneshwar and on that information, he went there, saw the dead body, noticed knife injuries on her neck and hands, her blouse was open, saree was pushed up to the knees, both the legs were in 'V' shape and her throat was also cut. PW.6 also deposed that on observation of the dead body, it appeared that she was raped and murdered. This witness also deposed that as he saw blood stains on the clothes of A1 to A3 on the previous day, he suspected that A1 to A3 might have committed the offence. This witness withstood his cross-examination.

**32.** PW.7-Shaik Shamshoddin deposed in his evidence that on 24.11.2019, between 08:00 and 08:30 AM, PW.1 and some police personnel came to their village and enquired about the wife of PW.1, then he stated that he saw her between 07:00 and 07:30 AM, while was selling utensils in their village. He accompanied them in search of her, but could not trace her out. On the next day, i.e., on 25.11.2019, he came to know that a female dead body was found. Immediately, he went to the spot and saw the dead body with knife injuries on her neck and hands and that her blouse was open, saree was removed up to the knees and both the legs were in 'V' shape and her throat was also cut and bleeding injuries were present on her both hands. This witness too deposed that on observation of the scene, it appeared that the deceased was raped and murdered. This witness was declared hostile and was cross-examined by the additional public prosecutor, during which, he admitted that he stated before the police that he suspected A1 to A3, as they were found missing from the village from 24.11.2019 onwards. Nothing was elicited in the cross-examination of this witness to discredit his testimony in chief examination.

**33.** PW.8-Varkade Datha deposed in his evidence that about one month back at about 07:30 AM, he saw the deceased while selling

utensils in their village of Yellapatar. On that day, at about 09:00 PM, the Sub Inspector of Police along with PW.1 came to their village, enquired about the deceased stating that she was missing. They all searched for the deceased, but could not find her on that day. On the next day at about 10:00 AM, he came to know that a dead body was found by the side of road at Ramnaik Thanda. Thereupon, he went there and identified the dead body as that of the deceased. He too noticed knife injuries on the neck and hands of deceased, her blouse was open, saree was removed up to knees and both the legs were in 'V' shape and her throat was cut. He too deposed that it appeared from the scene that the deceased was raped and murdered. PW.8 also deposed that as A1 to A3 were absconding from the village since the date of incident, he suspected that A1 to A3 might have committed the offence.

**34.** PW.9-Athram Madhav Rao has deposed that on 25.11.2019, on the instructions of Sub Inspector of Police, Lingapur, he photographed the dead body of deceased and handed over the photos and DVD thereof to the police. Ex.P.3 is the photographs and Ex.P.4 is the corresponding DVD. He also deposed that he issued Ex.P5-Certificate under Section 65B of Evidence Act (authenticity of electronic record).

**35.** PW.10-Shaik Saleem has deposed that on 27.11.2019, in between 09:00 AM and 10:00 AM, on the instructions of the DSP Asifabad, he came to DSP Office, Asifabad, where two panchas and A1 to A3 were present. The panch witnesses have taken A1 to A3 aside, one by one, and enquired and he recorded the said proceedings and handed over the DVD under Ex.P6 to the DSP and also issued Ex.P7-Certificate under section 65B of Evidence Act.

**36.** PW.11-Kadem Krishna deposed in his evidence that the deceased is his sister by courtesy. About one year back, he gave his BSNL SIM card bearing No.8331065878 to PW.1, who in turn gave it to deceased and she used the same till her death.

**37.** PW.12-Rathod Vasanth Rao has deposed in his evidence that on 25.11.2019 at about 10:30 AM, he along with his colleague Jadhav Tukaram came to the scene of offence situated in between Ramnaik Thanda and Yellapatar village on a call given by the DSP, Asifabad. There, he saw the dead body with knife injuries on her neck, hands and chest and abrasions on the back. He also noticed that her blouse was opened, saree was removed up to the knees and both the legs were widened. Her throat was also cut and bleeding injuries were there on her both hands. From the scene, it appeared that she was raped and murdered. The DSP conducted

Ex.P.8-Inquest Panchanama in their presence and he along with R.Sheela and Jadhav Tukaram signed on that panchanama. PW.12 further deposed that the police also conducted CDF panchanama in their presence, during which, he observed the scene, the police drew rough sketch and he along with two others signed Ex.P.9-CDF panchanama and Ex.P.10-rough sketch. The police also seized the bangle piece, one white colour chappal, one red colour cloth, control earth, blood stained earth and one bag containing utensils and other items such as tiffin box, spoons, hairs in a polythene bag, small air pump, one sweater and other items (total 22 in number) under Ex.P11-Panchanama and they signed the said panchanama. On identification of those items by PW.12, the same were marked as MOs.4 to 9 respectively.

**38.** PW.13-Kallem Thirupathi has deposed in his evidence that on 25.11.2019 in between 04:30 and 05:00 PM, the police called him and one P.Srinivas to Government Hospital, Utnoor, where, the police seized one blood stained blouse, blood stained saree and blood stained white colour torn panty piece of deceased under the cover of Ex.P12-Panchanama and he identified the same. MO.10 is the blood stained white colour torn panty piece. He along with Srinivas signed the slips and panchanama.

**39.** PW.14-Patri Srinivas deposed in his evidence that on 25.11.2019, between 04:30 and 05:00 PM, police called him and PW.13 to Government Hospital, Utnoor. There, the police seized one blood stained blouse, blood stained saree and blood stained white colour torn panty piece under cover of Ex.P.12-Panchanama and he identified the same. Police kept the said clothes in a polythene cover, sealed it and affixed slips containing his signatures and the signatures of PW.13 to it.

**40.** PW.15-Arram Nithin Kumar deposed in his evidence that on 27.11.2019 at about 09:30 AM, on the instructions of RDO, Asifabad, he along with Mohd.Younus went to SDPO Office, Asifabad, and by the time they reached there, A1 to A3 were present with the police and on the request of DSP, when he enquired A1 to A3, they disclosed their identity particulars. Later, he took A1 aside and on enquiry, A1 told him that on 24.11.2019 at about 07:00 and 07:30 AM, on seeing the deceased, who was selling utensils in Yellapatar village, they (accused) decided to rape her, as such they waited for opportunity and when the deceased started going towards Ramnaik Thanda, they followed her till 600 meters and when the deceased reached an isolated area, they pulled her towards the bushes, but the deceased raised cries, as such he (A1) threatened her with a knife and all of them (A1 to

A3) committed rape on her, one by one. After committing rape, as they were afraid of the deceased disclosing the matter to anybody, decided to kill her and as such, A1 cut the throat of deceased with a knife, while A2 and A3 caught hold of her hands and legs, and when the deceased resisted, A1 stabbed on her hands. Thereafter, A2 took the cell phone, while A3 took Rs.200/- of the deceased and later, all of them fled away from the village. PW.15 further deposed that A1 also disclosed that on 27.11.2019, the police apprehended all of them at Asifabad cross roads. PW.15 also deposed that A1, having confessed the offence, handed over MO.11-knife stating that it was used by him for commission of offence and as such, the police seized the same under cover of panchanama. The relevant portion of confession-cum-seizure panchanama of A1 is marked as Ex.P.13. PW.15 further deposed that at the time of confession, A1 was wearing the same clothes, which were worn by him at the time of commission of offence and the said clothes were having blood stains and the police seized the said clothes also i.e., MO.12-blood stained pant, MO.13-blood stained shirt and MO.14-underwear. PW.15 further deposed that the police seized MOs.11 to 14 under a cover of panchanama before them and he along with Mohd.Younus and A1 signed on the same. PW.15 further deposed that then he took A2 aside and on

enquiry, A2 also narrated the same facts as narrated by A1 and that A2 had taken the mobile of deceased, removed the SIM and threw it away. At the time of confession, A2 was wearing yellow colour shirt, brown colour pant and black with pink colour dots underwear, which were worn by him at the time of commission of offence and as such the police seized MO.1-mobile and also the said clothes i.e., MOs.15 to 17 from A2 under a cover of confession-cum-seizure panchanama and he along with Mohd.Younus and A2 signed it and Ex.P.14 is the relevant portion of confession-cum-seizure panchanama of A2. PW.15 further deposed that then he took A3 aside and on enquiry, A3 also narrated the same facts as stated by A1 and A2 and that he had taken away Rs.200/- from the blouse of deceased, and that at the time of confession, A3 were also wearing the same clothes which he worn at the time of commission of offence and as such the police seized the said clothes i.e., white colour with white lining shirt, light green colour pant and brown colour full underwear from A3. On identification of the same by PW.15, the clothes were marked as MOs.18 to 20 and the cash of Rs.200/- as MO.21. PW.15 further deposed that he along with Mohd.Younus and A3 signed on it and Ex.P.14 is the relevant portion of confession-cum-seizure panchanama of A3.

**41.** PW.16-J.Narayana/Tahsildar has deposed that on 26.11.2019, on the requisition of DSP, Asifabad, he along with the concerned VRO enquired with the villagers about the caste of the deceased and issued Ex.P.16-Caste Verification Report according to which, the deceased belongs to SC-Beda Budagajangam caste.

**42.** PW.17-M.Madhukar/Tahsildar deposed in his evidence that on 26.11.2019, on the requisition of DSP, Asifabad, he verified about the caste of A1 to A3 with the VRO concerned and issued Ex.P17-Caste Verification Report and according to which, A1 to A3 belong to BC-E Shaik caste.

**43.** PW.19-Dr.Vidyasagar deposed in his evidence that on 27.11.2019 at about 04:00 PM, on the requisition of police, he conducted Potency Test of A1 to A3 and issued certificates and as per his opinion, there is nothing to suggest that A1 to A3 are not capable of performing sexual act and Exs.P20 to P22 are the Certificates issued by him to that effect.

**44.** PW.20-Dr.Shaik Haseena Parvin, Assistant Director of Serology Department of FSL, Hyderabad, deposed in her evidence that on 30.11.2019, she received requisition from the Superintendent of Police, Asifabad, to conduct Serological

examination along with 15 sealed cloth parcels and one sealed card board box containing seals, which were intact, through R.Uddav Singh, Head Constable of Lingapur police station. The items so received are 1) soil etc., with dark brown stains, 2) soil etc., 3) brown colour synthetic saree with yellow and black colour border and design with dark brown stains; 4) torn pink colour polyester blouse with dark brown stains; 5) torn light green colour mill made underwear with dark brown stains; 6) All metal knife measuring 29½ cms with rust and dark brown stains; 7) A blue colour jeans pant with dark brown stains; 8) A green and black colour checks design full sleeved cotton shirt with faint dark brown stains; 9) A blue colour mill made underwear with company make CRITO; 10) A brown colour cotton pant; 11) An yellow colour full sleeved cotton shirt; 12) A black colour mill made full size underwear with pink and green colour; 13) A torn grayish green colour terry cotton pant; 14) A white colour polyester full sleeved shirt with violet colour stripes design; 15) A brown colour mill made underwear; 16) Eight glass slides with blood and dried smear on each one; and 17) Three cotton swabs with dark brown stains. PW.20 further deposed about the methods of test i.e., Biochemical test and Immunological test conducted by her. According to PW.20, she examined the above items 1 to 17 and as

per Serology Report, human semen and spermatozoa were detected on item no.3 i.e., saree of deceased, item no.12 i.e., underwear of A2, item no.15 i.e., underwear of A3, item no.16 i.e., on glass slides and item no.17 i.e., cotton swabs and that blood was detected on item no.1 i.e., soil, items 3 to 8 i.e., saree, blouse, underwear of deceased, knife, jeans pant and shirt of A1. According to PW.20, the origin of blood stains found on the items 1, 3, 4, 5 and 7 i.e., soil, saree, blouse, underwear of deceased and jeans pant of A1 is of human. She also deposed that blood was not detected on items 9 to 15 i.e., underwear of A1 and the clothes i.e., pant, shirts and underwear A2 and A3 and that semen and spermatozoa were not detected on items 4 and 5 i.e., blouse and underwear of deceased, items 7 to 11 i.e., jeans pant, shirt and underwear of accused no.1, pant and shirt of A2, and items 13 and 14 i.e., pant and shirt of A3 and that origin of blood stains on items 6 and 8 could not be determined and that blood group of seminal stains on items 3, 12 and 15 could not be determined and that blood was not detected on item no.2 which was received as control for item no.1. She further deposed that she issued Ex.P.23-Serology report.

**45.** PW.21-Dr. G. Pandu, Assistant Director of DNA Department of FSL, Hyderabad, deposed in his evidence that on 06.12.2019,

he received requisition from Superintendent of Police, Asifabad, for conducting DNA examination by producing A1 to A3. Accordingly, he collected blood samples from A1 to A3 as items 1 to 3 and also cloth parcels containing saree and torn underwear of deceased, plastic jars containing four glass slides with dried smear on each and three cotton swabs as items 4 to 7 respectively from Serology section and he extracted DNA from items 1 to 7, subjected it to Autosomal STR analysis by using global filer kit. There is no amplifiable DNA yield from source of item no.5 (victim underwear) and item no.7 (cotton swabs). He compared the DNA profiles obtained from items 4 and 6 with DNA profiles obtained from items 1 to 3 and the allelic pattern of items 4 and 6 matches with the allelic pattern of items 1 to 3. He concluded that the Autosomal SRT analysis indicates that the seminal stains on item no.4 (saree of victim) is matching with the DNA profiles of A1 and A2 and they conclusively prove that they are of same biological origin. The DNA profile of source of item no.6 (glass slides) is matching with the DNA profile of A3 and it conclusively proves that they are of same biological origin. He issued DNA report with Electropherogram, which is marked as Ex.P.24.

**46.** PW.22-N. Srinivasulu, Sub Divisional Engineer, BSNL Office, has deposed that on 11.12.2019, he received requisition from

Additional Superintendent of Police, Asifabad, to furnish certified copy of CDRs and Customer Application Form of mobile No.8331065878 for the period from 22.11.2019 to 24.11.2019 and accordingly he issued the same and as per him, the said number stands in the name of PW.11/Kadem Krishna and he also furnished the certified copy of CDRs of said mobile and it also stands in the name of PW.11/Kadem Krishna. During that period, the cell phone was within the purview of Usegaon and Jainoor village. He also issued certificate under section 65B(4)(c) of Indian Evidence Act. The above three certificates were marked as Exs.P.25 to P.27 respectively.

**47.** PW.23-Pawar Santhosh, Police Constable, deposed in his evidence that on 25.11.2019 at about 12.00 Noon, the DSP formed one ID party team consisting of himself, HC-604 and PC-3173 to apprehend A1 to A3 and accordingly they started searching for them; on 27.11.2019 at about 8:30 AM, they received information about the presence of A1 to A3 near Wankidi road towards Adilabad cross roads of Asifabad. Immediately their team reached the spot, identified A3 and on seeing them A3 tried to escape from that place. Then they apprehended A1 to A3 and produced them before DSP, Asifabad.

**48.** PW.24-N.Venkatesh, Sub Inspector of Police, Lingapur Police Station, has deposed that on 24.11.2019 at about 08:00 PM, he received complaint from PW.1, based on which he registered a case in Crime No.49 of 2019 under the head 'woman missing', issued Ex.P28-FIR, recorded statement of PW.1, collected the photographs of deceased from PW.1, prepared look out notice, forwarded it to all police stations in the State. Later, he along with his staff, PW.1 and his relatives went to Yellapatar and Ramnaik Thanda villages, searched and enquired about the missing woman till 10:00 PM, but could not find her out. On 25.11.2019, he deputed a team for searching that woman, while so at about 09:30 AM, PW.1 came to police station along with a complaint stating that his wife's dead body was traced at the outskirts of Ramnaik Thanda. Based on it, he altered the section of law to 376D, 302, 404 r/w 34 IPC and sections 3(2)(v) of SCs/STs (POA) Act and filed Ex.P29-Section Alteration Memo before the Judicial Magistrate of First Class, Utnoor. As the offence is a grave one and the missing woman belongs to SC community, he flashed radio message to Superintendent of Police and on receipt of mail informing that DSP, Asifabad, was appointed as Investigation Officer, he handed over the CD file to him and as per his

instructions, he visited scene of offence by informing the photographer.

**49.** PW.25-A.Satyanarayana, DSP, Asifabad, deposed in his evidence that on 25.11.2019 at about 09:30 AM, on receipt of information from PW.24 about tracing of dead body of the deceased, he rushed to Lingapur police station, by then he was appointed as Investigating Officer in this case through Ex.P.30 memo, as such he received CD file from PW.24, went to scene of offence i.e., in between Ramnaik Thanda and Yellapatar village along with CI of Police and other staff, saw the dead body of deceased and PW.1 identified the dead body. He examined PWs.1, 2 and other witnesses. He conducted Inquest Panchanama, CDF and also drew Rough Sketch in the presence of PW.12 and two others viz., Rathod Sheela and Jadhav Tukaram and seized MOs.4 to 9 in their presence under Ex.P11-Panchanama and later he went to Government Hospital, Utnoor and at about 04.45 PM, seized MO.2/blood stained brown colour saree, MO.3/blood stained rose colour blouse, MO.10/blood stained white colour torn panty piece before panch witnesses, i.e., PWs.13 and 14 under Ex.P12. He collected Ex.P3/photographs, Ex.P4/DVD, Ex.P9/65B Certificate from PW.9 and formed a special team consisting of PW.23 and two others for apprehending the accused. PW.25 further deposed that

by issuing requisitions, he collected Ex.P16/Caste Certificate of deceased from PW.16 and Ex.P17/Caste Certificate of A1 to A3 from PW.17, according to which, the deceased belongs to SC-Beda Budagajangam community, while A1 to A3 belong to BC-E Shaik Muslim community. On 27.11.2019 at about 09:30 AM, PW.23 and other two police personnel produced A1 to A3 before him stating that at about 09:00 AM, they apprehended them at Adilabad cross road of Asifabad. Thereupon, he secured the presence of PW.15 and one Mohd.Younus as panch witnesses, PW.10/videographer and on his request, PW.15 and Mohd.Younus enquired A1 to A3, one by one, and all the accused confessed to have committed the offence. Later, A1 produced one blood stained knife and also blood stained blue colour jeans pant, blood stained green black colour checks shirt and blood stained blue colour CRITO company underwear, which were worn by him at the time of offence. Similarly A2 and A3 also produced their clothes i.e., pant, shirts and underwear, which were worn by them at the time of offence. A2 also produced MO.1/mobile stating that it was stolen by him from the deceased, while A3 also produced MO.21/Cash of Rs.200/- stating that he had stolen it from the deceased at the time of offence. Accordingly, he seized the knife, clothes of accused, mobile and cash under cover of three separate

panchanamas before the panch witnesses under video coverage by PW.10. After getting conducted potency test of A1 to A3 at Government Hospital, Asifabad, effected their arrest and produced them before Judicial Magistrate of First Class, Utnoor, for judicial remand. He collected Potency Test Certificates of A1 to A3 under Exs.P20 to P22 from PW.19. Later, he examined some other witnesses also, obtained preliminary PME report under Ex.P18 from PW.8 and another doctor, forwarded material objects preserved by the team of doctors to FSL through Superintendent Of Police, Asifabad, through Ex.P31/Letter of advice. On 06.12.2019, as per the orders of Court in Crl.M.P.No.558 of 2019, he produced A1 to A3 before Telangana State Forensic Science Laboratory, Hyderabad, for collecting blood samples to conduct DNA comparison through Ex.P32/Letter of Advice. On 08.12.2019, he submitted requisition to PW.22/Nodal officer to furnish certified copy of CAF and CDRs of mobile of the deceased, collected Exs.P25 to P27 and on comparison, Exs.P25 and P26 tallied with the IMEI number of mobile of deceased, which was recovered from A2. On the same day, he submitted another requisition to the Nodal Officer of Reliance Jio to furnish CAF and CDRs for the mobile No.9502721152 of PW.1 and the same were received. On 13.12.2019, on receipt of DNA and Serology reports, he submitted

report to PW.18 and another doctor Rathnamala and obtained Ex.P19/Final opinion from them about the cause of death, which was "*due to shock and hemorrhage as a result of cut throat injury and there is evidence of recent vaginal sexual intercourse*." He further deposed that on completion of investigation and collecting all the documents, laid charge-sheet against A1 to A3 for the offences punishable under Sections 376D, 302, 404 r/w 34 IPC and Sections 3(1)(w-i) and 3(2)(v) of SCs/STs (POA) Act.

**50.** While the case of prosecution is that it is A1 to A3 who raped and murdered the deceased, the case of A1 to A3 is total denial. The evidence on record establishes the presence of deceased at Yellapatar village on 24.11.2019 for selling utensils and later, she was found dead in the fields at the outskirts of Ramnaik Thanda. PWs.4 to 6 are circumstantial witnesses. According to PW.4, on 24.11.2019 at about 10.30 AM, while he along with his wife and other labourers was picking up cotton in their fields, they heard the shrieks of a lady from the nearby fields, as such they went towards that place but they could not find anything, as such they returned to his field and at that time he saw A1 to A3 going from Ramanik Thanda side towards Yellapatar village. On the next day, PW.4, on coming to know about the tracing of dead body of the deceased, he went to the spot and observed that the same was

the place from which, he heard the shrieks on the previous day. PW.5 deposed that on one Sunday at about 9.00 AM, while he was going to Pamulawada from Yellapatar village, he saw A1 to A3 going towards Ramnaik Thanda by walk. He even deposed that after crossing two fields, he saw the deceased going towards Ramnaik Thanda by carrying utensils bag on her head. PW.6 testified in his evidence that on 24.11.2019 at about 11.30 AM, when he was at his kirana shop, A1 to A3 came to his shop and at that time, he saw blood stains on the clothes of A1 to A3. Since the evidence of PWs.4 to 6 remained unshaken in their cross-examination, no adverse interest could be attributed to them and their evidence can be safely relied upon. A cumulative reading of the evidence of PWs.4 to 6 makes it clear that on 24.11.2019 at about 09:00 AM, PW.5 saw A1 to A3 going towards Ramnaik Thanda following the deceased; at about 10:30 AM, PW.4 heard the shrieks of a lady from the nearby fields of Ramnaik Thanda and within no time he even saw A1 to A3 coming from that side; and at 11:30 AM, PW.6 saw A1 to A3 at his shop in blood stained clothes. In Ex.P18-PME Report also, the approximate time of death of deceased was mentioned as 24 to 28 hours prior to post mortem examination, which tallies with the time of shrieks heard by PW.4. The timings narrated by PWs.4 to 6 do not give any

scope even to draw a presumption that there was any chance for A1 to A3 to go anywhere in the meanwhile. Thus, the above chain of events firmly establishes the presence of A1 to A3 around the deceased, all the while, till her death. Further, A1 to A3 being found in blood stained clothes by PW.6 within no time, forms a strong incriminating circumstance against A1 to A3, proving their involvement in the crime. Thus, the prosecution *prima facie* discharged its burden with regard to the complicity of A1 to A3 in the commission of the subject offence. Now the onus shifts to A1 to A3 to rebut the case of prosecution by offering plausible explanation or by adducing cogent and convincing evidence that they were not present around the deceased at that time. Under these circumstances, the examination of A1 to A3 under Section 313 of Cr.P.C., assumes importance.

**51.** Learned senior counsel for A1 to A3, relying on **Shivaji Chintappa Patil**'s case (13 supra), argued that that though false explanation or non-explanation by an accused in his statement under Section 313 of Cr.P.C. can be used as an additional circumstance when the prosecution has proved the chain of circumstances leading to no other conclusion than that of the guilt of the accused, however, it cannot be used as a link to complete the chain of circumstances. It is settled law that statements of the

accused in course of examination under Section 313 of Cr.P.C., since not on oath, do not constitute evidence under Section 3 of Evidence Act, yet, the answers given by the accused are relevant for finding out the truth and examining the veracity of the prosecution case. In a very recent judgment in **Premchand Vs. State of Maharashtra**[19], the Hon'ble Apex Court, while summarizing the settled principles with regard to Section 313 of Cr.P.C., held as follows:

> "Judicial experience has shown that more often than not, the time and effort behind such an exercise put in by the trial court does not achieve the desired result. This is because either the accused elects to come forward with evasive denials or answers questions with stereotypes like 'false', 'I don't know', 'incorrect', etc. Many a time, this does more harm than good to the cause of the accused. For instance, if facts within the special knowledge of the accused are not satisfactorily explained, that could be a factor against the accused. Though such factor by itself is not conclusive of guilt, it becomes relevant while considering the totality of the circumstances. A proper explanation of one's conduct or a version different from the prosecution version, without being obliged to face cross- examination, could provide the necessary hint or clue for the court to have a different perspective and solve the problem before it."

**52.** In the instant case, the trial Court has put as many as 51 questions to the accused in the process of examining them under Section 313 of Cr.P.C. For almost all the questions, the accused answered either 'false' or 'don't know' or 'they forced me to say like that'. However, A1, in his examination under section 313 of Cr.P.C., submitted that he was residing in Dhannora village along

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with his wife, but admits his coming to Yellapatar village on the date of offence for getting ration. This admission of A1 further fortifies the above evidence of PWs.4 to 6. A2, in his examination under Section 313 of Cr.P.C., submitted that he was in the house of his sister at Himayath Nagar of Sengam village. However, A2 did not choose to get her sister examined before the Court. Had A2 got examined her sister before the Court, her evidence would have thrown some light with regard to the presence of A2. He did not choose to do so. Further, A3 submitted that he was engaged in digging of well on that day. All the accused even pleaded that they would adduce evidence of the villagers to prove their contentions and the trial Court even adjourned the case twice enabling the accused to produce evidence on their behalf, but they failed to adduce any such evidence and finally reported no evidence on their behalf. The accused could not examine even anyone of their family members. This failure on the part of the accused clearly shows that their above explanations are nothing but evasive and false. Further, we find that the trial Court had used the factor of non-explanation under Section 313 of Cr.P.C., only as an additional link to fortify the finding that the prosecution had established chain of events unquestionably leading to the guilt of the accused and not as a link to complete the chain. The trial

Court held that "*the failure of accused to adduce any evidence coupled with the self admission of A1 that he came to Yellapatar village on that day for ration becomes an additional circumstance to the above established circumstantial evidence of the prosecution.*"

**53.** Learned senior counsel for A1 to A3 would submit that the 'last seen theory' was not proved in this case; the only observation made was that the deceased went towards Ramnaik Thanda and A1 to A3 also went towards Ramnaik Thanda; however, the deceased and A1 to A3 were not seen going together by any of the prosecution witness; therefore, since the deceased and A1 to A3 were not spotted together, the 'last seen theory' is not proved. We are not impressed with the said submission. The law with regard to 'last seen theory' is well settled. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible. Once the theory of 'last seen together' is established by the prosecution, the accused is expected to offer some explanation as to when and under what circumstances he had parted the company of the deceased. It is true that the

burden to prove the guilt of the accused is always on the prosecution, however in view of Section 106 of the Evidence Act, when any fact is within the knowledge of any person, the burden of proving that fact is upon him. Of course, Section 106 of Evidence Act is certainly not intended to relieve the prosecution of its duty to prove the guilt of the accused, nonetheless it is also equally settled legal position that if the accused does not throw any light upon the facts which are proved to be within his special knowledge, in the light of Section 106 of the Evidence Act, such failure on the part of the accused may be used against the accused, as it may provide an additional link in the chain of circumstances required to be proved against him. In the case based on circumstantial evidence, furnishing or non-furnishing of explanation by the accused would be a very crucial fact, when the theory of "last seen together" as propounded by the prosecution was proved against him.

**54.** In **Rajender vs. State (NCT of Delhi)**[20], the Hon'ble Apex Court observed as under:

> "It is crucial to note that the reasonableness of the explanation offered by the accused as to how and when he/she parted company with the deceased has a bearing on the effect of the last seen in a case. Section 106 of the Evidence Act, 1872 provides that the burden of proof for any fact that is especially within the knowledge of a person lies upon such person. Thus, if a person is last seen with the deceased, he must offer an explanation as to

[20] (2019) 10 SCC 623

how and when he parted company with the deceased. In other words, he must furnish an explanation that appears to the court to be probable and satisfactory, and if he fails to offer such an explanation on the basis of facts within his special knowledge, the burden cast upon him under Section 106 is not discharged. Particularly in cases resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, such failure by itself can provide an additional link in the chain of circumstances proved against him. This, however, does not mean that Section 106 shifts the burden of proof of a criminal trial on the accused. Such burden always rests on the prosecution. Section 106 only lays down the rule that when the accused does not throw any light upon facts which are specially within his/her knowledge and which cannot support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce an explanation as an additional link which completes the chain of incriminating circumstances."

**55.** Further, in **Satpal Vs. State of Haryana**[21], the Hon'ble Apex Court observed as under:

"We have considered the respective submissions and the evidence on record. There is no eyewitness to the occurrence but only circumstances coupled with the fact of the deceased having been last seen with the appellant. Criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine."

[21] (2018) 6 SCC 610

**56.** In view of the afore-stated legal position, it is discernible that though the 'last seen theory', as propounded by the prosecution in a case based on circumstantial evidence, may be a weak kind of evidence by itself, to base conviction solely on such theory, when the said theory is proved coupled with other circumstances such as the time when the deceased was last seen with the accused and the recovery of the corpse being in very close proximity of time, the accused does owe an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death might have taken place. If the accused offers no explanation or furnishes a wrong explanation, absconds, motive is established and some other corroborative evidence in the form of recovery of weapon etc. forming a chain of circumstances is established, the conviction could be based on such evidence. In the instant case, PW.5 deposed in his evidence that on 24.11.2019 at about 09:00 AM, he saw A1 to A3 going towards Ramnaik Thanda following the deceased; PW.4 deposed that at about 10:30 AM, he heard shrieks of a lady from the nearby fields; and PW.6 deposed that at 11.30 AM, he saw A1 to A3 at his shop in blood stained clothes. On the next day, i.e., on 25.11.2019 at 09:00 AM, the dead body of the deceased was found. Therefore, the time gap between the period when the

deceased was last seen being followed by A1 to A3 and the recovery of the corpse of the deceased, being quite proximate, the non-explanation of A1 to A3 with regard to the circumstance under which and when they have departed the company of the deceased was a very crucial circumstance proved against them. When the prosecution established the facts from which, a reasonable inference can be drawn that A1 to A3 have raped the deceased and thereafter murdered her, A1 to A3 should have, by special knowledge regarding those facts, offered an explanation which might drive the Court to draw a different inference. They did not do so. Since the burden of proving the facts especially known to them was on A1 to A3 as per Section 106 of Evidence Act and since they did not discharge the same, an adverse inference can be drawn against A1 to A3. Thus, a comprehensive study of the above circumstances clinchingly point towards the involvement of A1 to A3 in the commission of offence. The sequence of circumstances from the evidence of PWs.4 to 6 also formed a complete chain of events without any gap, all clinchingly pointing towards the complicity of A1 to A3 in the commission of the subject offence. Thus, we are in agreement with the finding recorded by the trial Court that from the evidence of PWs.4 to 6, the prosecution was able to link A1 to A3 with the offence properly

and there are no other adverse circumstances to break the chain and there is also no room for any other hypothesis and that the prosecution amply established that all the circumstances are undoubtedly pointing to the guilt of A1 to A3 only.

**57.** Learned senior counsel for A1 to A3 argued that PWs.2 to 8 are interested witnesses and their evidence cannot be relied upon. We do not see any merit in the said submission. True it is, PW.2 is a relative of PW.1 and PWs.3 to 8 deposed in their evidence that they know PW.1. However, it is settled law that a close relative, who is a natural witness, cannot be regarded as an interested witness. The term 'interested' postulates that the person concerned must have direct interest in seeing that the accused person is somehow or the other convicted, either because of some animus with accused or for some reason. 'Interested witness' is a witness who is vitally interested in securing conviction of a person due to previous enmity. In the instant case, nothing has been elicited from the cross-examination of PWs.2 to 8 that they were inimical to A1 to A3. Merely knowing PW.1 cannot make PWs.2 to 8 partisan witnesses rather they would be natural witnesses.

**58.** Learned senior counsel further contended that the confession allegedly made by A1 to A3 with regard to the commission of the

subject offence is hit by Section 26 of Evidence Act, which mandates that no confession by the accused whilst in the custody of police shall be proved, unless it is made in the immediate presence of a Magistrate and that Court below ought to have discarded the evidence of discovery of weapon and blood stained clothes of A1 to A3, as the prosecution has not been able to prove the authorship of concealment. We do not find any force in the said submission. It has to be seen that the confession by A1 to A3, though made in the presence of police, but was not made to the police but was evidently made to independent panch witnesses, i.e., PW.15 and two other independent witnesses. Further, the trial Court has not taken the entire confession of A1 to A3 into consideration, but it has taken the relevant portion of confession of A1 to A3, which led to recovery of material objects from them and which is valid under Section 27 of Evidence Act. Under Section 27 of Evidence Act, the 'fact discovered' should be there in the information received from an accused person while in custody of police officer. It is this 'information' which gets confirmed by the subsequent recovery. Thus, whatever information given by the accused consequence of which a fact is discovered, only such information is protected by Section 27 of the Indian Evidence Act. In the instant case, the confessions made by

A1 to A3 to PW.15 to the extent of recovery of MO.1/mobile, MO.11/knife, MOs.12 to 20/clothes of accused and MO.21/cash are admissible in evidence and can be accepted. Further, there is no rigid rule postulated in Section 27 of Evidence Act that material object(s) cannot be directly collected from the accused and should be collected from anywhere else. The words "discovery of material objects on confession of accused" do not necessarily mean that the said discovery has to be made from somewhere else. A holistic reading of Section 27 of Evidence Act makes it clear that any discovery in pursuance of confession amounts to discovery of fact. In the instant case, as per the evidence of PW.15, A1 to A3 confessed to him about the commission of offence one by one and pursuant to their confession, they produced the material objects, which mean that discovery of material objects was made in consequence of the information given by A1 to A3. Resultantly, recoveries made pursuant to disclosure statements of A1 to A3 are duly proved by the prosecution and there is no substantial reason to discard the same. Further, recovery of MO.1/mobile and MO.21/cash of Rs.200/- and other articles such as MO.11/knife and blood stained clothes of accused, at the behest of accused, is a strong incriminating circumstance against them, which they could not rebut by offering plausible explanation as to how they

came into possession of the said articles, particularly the articles belonging to the deceased. Thus, we concur with the finding recorded by the Court below that through the evidence of PW.15, the prosecution successfully established the recoveries made pursuant to the confession of A1 to A3 to PW.15.

**59.** Learned senior counsel for A1 to A3 further argued that no permission was obtained from A1 to A3 to collect blood samples from them to conduct DNA test; that by compelling A1 to A3 to give blood samples for DNA test, the right against self-incrimination protected to them under Article 20(3) of the Constitution of India are violated; that DNA report is not a conclusive proof to hold that A1 to A3 are guilty of the offence alleged against them; and that Serology report and DNA report are not connecting A1 to A3 with the subject offence and hence, the same cannot be relied upon. In our opinion, there is no force in the said submissions. In a recent judgment in **Das @ Anu Vs. State of Kerala**[22], the Hon'ble Kerala High Court held that the protection guaranteed under Article 20(3) of the Constitution of India does not extend to protecting an accused from being compelled to give his blood sample during the course of investigation of a criminal case. In a criminal case, especially in a

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case involving sexual offence, drawing of blood sample from the body of the accused would not violate his right against self-incrimination protected under Article 20(3). The right against self-incrimination is just a prohibition on the use of physical or oral compulsion to extort testimonial evidence from a person, not an exclusion of evidence taken from his body when it may be material. Though Section 53A of Cr.P.C. only refers to examination of the accused by a medical practitioner at the request of the police officer, the Court also, in appropriate cases, can give a direction to the Police Officer to collect the blood sample of the accused and conduct DNA test for the purpose of further investigation under Section 173(8) Cr.P.C. There is no testimonial compulsion in the process of taking a sample of blood by a qualified and registered medical practitioner, and in no case, it could be said that by this process, the accused is forced to tender evidence against himself nor by this process accused is being compelled to be a witness against himself. That apart, as per Section 53A of Cr.P.C, the police have got enough power to send the accused to a qualified medical practitioner for the purpose of taking samples. The examination of the person of the accused is contemplated as an aid to the investigation of the trial to ascertain facts which may afford evidence as to the commission of the

offence under investigation. This view is further fortified in **Selvi and others Vs. State of Karnataka**[23], wherein, the Hon'ble Apex Court held that taking and retention of DNA samples which are in the nature of physical evidence, does not face constitutional hurdles in the Indian context. The Hon'ble Apex Court, in **Sunil Vs. State of Madhya Pradesh**[24], held that a positive result of DNA test would constitute clinching evidence against the accused in a prosecution for rape.

**60.** Here, it is apt to state that recent advancement in modern biological research has regularized forensic science resulting in radical help in the administration of justice. DNA Technology, as a part of forensic science and scientific discipline, not only provides guidance to the investigation but also supplies the Court, accrued information about the tending features of the identification of criminals. After the amendment of Criminal Procedure Code, by the insertion of Section 53A by Act 25 of 2005, DNA profiling has now become a part of the statutory scheme. Section 53A relates to the examination of a person accused of rape by a medical practitioner. DNA profiling test is now specifically included by way of explanation to Section 53 of Cr.P.C. Thus, Section 53A included in the Code of Criminal Procedure by way of the Amendment Act of

[23] AIR 2010 SC 1974

2005, makes the DNA profiling of the accused and the victim permissible in cases of rape. The observation to this effect has been made by the Hon'ble Apex Court in **Krishan Kumar Malik Vs. State of Haryana**[25] in the following words.

> "Now, after the incorporation of Section 53A in the Code of Criminal Procedure with effect from 23.06.2006, it has become necessary for the prosecution to go in for DNA test in such type of cases facilitating the prosecution to prove its case against the accused."

**61.** True it is, DNA test cannot be said to be conclusive proof with regard to the allegations made against the accused, but however, it is an important piece of corroborative evidence and if a positive result of DNA test comes out against the accused, it would constitute clinching evidence against him for proceeding further. In the instant case, the evidence of PW.21, who collected blood samples of A1 to A3 and conducted DNA test, establishes that on comparison of DNA profiles obtained from the saree of deceased and glass slides with that of DNA profiles of A1 to A3 collected by him, the allelic pattern matched with each other. It is also his conclusive evidence that the Autosomal SRT analysis indicates that the seminal stains on the saree of victim are matching with the DNA profiles of A1 and A2 and they are of same biological origin and that the DNA profile obtained from glass slides match with the

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[24] (2017) 4 SCC 393
[25] (2011) 7 SCC 130

DNA profile of A3 and they are of same biological origin and the same is established from Ex.P24-DNA report issued by him. Further, the evidence of PW.20, who conducted serological examination, establishes the presence of semen and spermatozoa on the saree of deceased, underwear of A2 and A3 and glass slides and cotton swabs of deceased drawn and preserved by PW.18 at the time of post-mortem. The accused failed to elicit anything material from the evidence of PWs.20 and 21 to show that the samples were not authentic or that they were tampered in any manner. Hence, there is nothing to discredit the evidence of PWs.20 and 21. Therefore, we concur with the finding of the trial Court that the evidence of PW.21 coupled with his report under Ex.P24, is a strong piece of evidence incriminating A1 to A3 in the subject offence.

**62.** Further, the prosecution has relied upon the evidence of PWs.19 to 21 in order to establish that A1 to A3 are the persons who committed rape on the deceased and committed her murder. PW.19, the doctor who conducted potency test on A1 to A3, deposed that A1 to A3 are capable of performing sexual act. Nothing is elicited from him to show that the potency test so conducted is not scientifically approved and reliable and potency

cannot be decided through the test conducted by him. Hence, the evidence of PW.19 can be relied upon.

**63.** Learned senior counsel for A1 to A3 argued that as PW.20 admitted that whether the semen found on the material objects deposed by her was mixed one or pertaining to a single person and blood grouping was also not done, her evidence has to be discarded. This is a case of gang rape. Therefore, grouping of semen, admittedly, may not be possible. Merely because of this trivial reason, the entire evidence of PW.20, which consistently establishes the presence of semen and spermatozoa on the saree of deceased and on the clothes of A1 to A3 and glass slides cannot be discarded.

**64.** In **Dattatraya @ Datta Ambo Rokade**'s case (13 supra) relied by the learned Public Prosecutor, the Hon'ble Apex Court held that the DNA profile of semen detected on the underwear (Bermudas) of the accused, the bedsheet, vaginal swab and anal swab of the victim are identical and from one and the same source of male origin and that the DNA analysis establishes beyond reasonable doubt that the victim was raped by the accused-appellant.

**65.** In **Mukesh and another Vs. State (NCT of Delhi) and others**[26], popularly known as NIRBHAYA CASE, the Hon'ble Apex Court held that the evidence of DNA analysis is unimpeachable evidence as to the involvement of the offending bus in the commission of offence and also strong unimpeachable evidence connecting the accused with the crime.

**66.** Further, the evidence of PW.9 establishes that he took photographs of the dead body of deceased and handed over the same to police. PW.11 deposed in his evidence that he gave his mobile to PW.1 for temporary usage and PW.1, in turn, gave it to the deceased and she was using the same till her date of death. The evidence of PW.22 corroborates the evidence of PW.11, as the evidence of PW.22 establishes that the mobile and SIM, which were used by the deceased, stand in the name of PW.11. This evidence, coupled with the evidence of PW.15 who deposed that the said mobile of deceased was recovered from A2, fortifies the case of prosecution in proving the guilt of accused. Through the evidence of PW.12, the prosecution has established the conducting of inquest over the dead body under Ex.P.8, conducting of CDF panchanama, rough sketch under Exs.P.9 and P.10 and seizure of MOs.4 to 9 from the scene. The evidence of PW.12 remained

[26] (2017) 6 SCC 1

unshaken in the cross-examination. The evidence of PWs.13 and 14 establishes the seizure of clothes of deceased. Through the evidence of PWs.16 and 17, the prosecution could establish that the deceased belongs to SC-Beda Budagajangam community and A1 to A3 belong to BC-E Shaik community. As already held *supra*, the evidence of PW.18 medical officer establishes not only the cause of death as shock and hemorrhage as a result of cut throat injury and there was recent vaginal sexual intercourse on the deceased, but also establishes that there were some other injuries such as contusion on chest, multiple abrasions on jaw, multiple nail scratch marks on upper chest, incised injuries on right palm, index finger and abrasions on the back of chest and right and left knee and also fractures of right and left side ribs, which all firmly establish that there was strong resistance from the deceased during commission of offence by the accused against her. Further, it is apt to note that very case of prosecution as well as the evidence of above referred independent prosecution witnesses referred is that the accused were absconding from the village from the date of offence and on that reason also, they entertained suspicion against A1 to A3. In view of this evidence, the accused cannot be expected to have the opportunity of changing their dresses and as such they would have continued in the same

clothes till their date of arrest by the police. Furthermore, the above discussed circumstances also clinchingly establish the guilt of A1 to A3.

**67.** Learned senior counsel, relying on **Asharfi**'s case (10 supra), argued that in the absence of evidence proving intention of A1 to A3 in committing the offence upon the deceased only because she belonged to Scheduled Caste community, their conviction under Section 3(2)(v) of SCs/STs (POA) Act, is unsustainable. While there cannot be any dispute with regard to the legal preposition laid down by the Hon'ble Apex Court in this regard in **Asharfi**'s case (10 supra), we do not propose to examine the said contention since the Court below did not award any punishment for the said penal provision. The trial Court held that "*since the maximum punishment prescribed thereunder is only life, a separate is also though framed for it, but as this court has already awarded capital punishment of death for the major offence i.e., section 302 IPC and life imprisonment under section 376-D IPC against the accused 1 to 3 covering this offence also, no punishment for this offence, in separate, is awarded*".

**68.** Learned senior counsel for A1 to A3 pointed out certain minor contradictions in the case of prosecution. However, we are

of the view that those minor contradictions do not go to the root of the matter and destroy the whole prosecution which is firmly made out against A1 to A3. In **Sunil Kumar Sambhudayal Gupta and others Vs. State of Maharashtra**[27], the Hon'ble Apex Court held as follows:

> "While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The Trial Court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate Court in normal course would not be justified in reviewing the same again without justifiable reasons."

**69.** Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. Vague hunches cannot take place of judicial evaluation. A judge does not preside over a criminal trial, merely to see that no innocent man is punished, but he also presides to see that a guilty man does not

[27] (2010) 13 SCC 657

escape. Both are public duties. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth.

**70.** On a meticulous analysis of the evidence on record, we have no hint of hesitation to hold that the prosecution has established by leading cogent and convincing evidence that on 24.11.2019, while the deceased was going towards Ramnaik Thanda, A1 to A3 followed her and when she reached the fields in the outskirts of Ramnaik Thanda village, dragged her in to the bushes, committed rape on her one by one and thereafter, apprehending danger to their lives in the event of her disclosing the same to anybody, A1 committed her murder by cutting her throat brutally with MO.11/knife and thereafter, A2 and A3 dishonestly took away the mobile phone and cash of Rs.200/- from the deceased. The cruel and barbaric acts of A1 to A3 do attract the offences with which they were charged. All the circumstances, being of a definite tendency, are unerringly pointing towards the guilt of A1 to A3. The circumstances, taken cumulatively, form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by A1 to A3 and none else. All the necessary ingredients of Sections 376D, 302, 404 read with 34 of IPC and Section 3(1)(w-1) and Section 3(2)(v) of SC/ST

(POA) Act, 1989 are made out against A1 to A3 and the trial Court is justified in convicting A1 to A3 of the said offences. There is nothing to take a different view. Accordingly, we uphold the conviction recorded against A1 to A3 of the offences under Sections 376D, 302, 404 read with 34 of IPC and Section 3(1)(w-1) and Section 3(2)(v) of SC/ST (POA) Act, 1989.

**71.** This takes us to the most crucial question as to whether the trial Court is legally justified in imposing capital punishment against A1 to A3 holding that the crime committed by them satisfied the test of 'rarest of rare case'.

**72.** Imposition of capital punishment has taxed the imagination of the judicial mind, inasmuch as it has moral implications, legal consequences, and societal effects. Therefore, the world over the common man, the Legislators and the Judges are divided over the issue whether, in fact, death penalty should continue to be inflicted by way of punishment upon an accused or not.

**73.** There have been rival views on imposition of death penalty on an accused by '*the abolitionists of capital punishment*' and '*rententionists of capital punishment*'. It is the constant effort of the abolitionists of death penalty to discontinue the practice of sentencing an accused to death. They plead that to give life or to

take away life is a divine function, which cannot be bestowed upon mere mortals. Moreover, there is no empirical data to prove that imposition of death penalty, indeed, leads to decline in the commission of the offence for which, death penalty has been prescribed as one of the punishments. Thus, according to abolitionists of capital punishment, the argument of deterrent effect of the capital punishment is a highly misplaced and presumptive argument. The abolitionists further argue that the modern civilization has travelled far away from the primitive idea when *Hammurabi*, the first lawgiver of the West, had prescribed the punishment as "*an eye for an eye, a tooth for a tooth*". Therefore, punishment is no longer meant to be retributive in nature. Merely because the life of a victim has been lost, it would not justify in depriving the life of the criminal. For revenge, in whatever disguise, cannot be claimed by a modern civilized society. The abolitionists further claim that the philosophy behind 'punishment' is to reform the criminal. By imposing the capital punishment, both the society and the State admit their failure in reforming the offender. However, every effort should be made by the society and the State to reform the criminal while he is incarcerated. They further plead that the imposition of the death penalty is highly disproportionate to the offence. For, while the

deceased might have died an instantaneous death or might have suffered certain trauma prior to his death, but by keeping the prisoner on death row for number of years, the pain and agony brought about by the frightful thought that he may die tomorrow, inflicts unimaginable pain and agony on the accused. Therefore, death penalty is cruel and unusual punishment and such punishment cannot be sanctified by a Constitution, which values the dignity of life. The abolitionists further claims that even a prisoner has a right to live with dignity. Although his personal liberty may be cribbed, cabined and confined, but nonetheless, his right to breathe his life as an individual should continue to exist. It is also their theory that considering the futility of imposing the capital punishment, majority of the countries in the world do not have capital punishments in their statutes and therefore, our country needs to re-think about the imposition of the capital punishment and to realign itself with the majority of the nations of the world. According to the abolitionists of capital punishment, India is a vibrant Democratic Republic, which is known for its liberalism, and for its human rights record and the existence of capital punishment in the Penal Code, 1860, is a blotch on the pristine image of the nation as the largest democracy in the world.

**74.** Contrary to the view of the abolitionists of capital punishment, the retentionists of capital punishment have stressed on the fact that those who violate the law in such a gruesome manner that shocks the conscience of the society, those who defy the command of the law, those who rattle the society from within, deserve no mercy. The society has a right to deny life to those who continue to pose a danger to the wellbeing and to the tranquility of the society at large. They equally argue that the punishment prescribed should be so harsh, as to deter the potential offender from committing the crime. Therefore, the prescription of the death penalty is a preventive measure taken by the society, rather than a curative one. Therefore, imposition of capital punishment is justified, even if it is the harshest punishment that can be inflicted upon a human being.

**75.** However, in the Indian context, the debate with regard to the imposition or non-imposition of death penalty is a futile discussion. For, death penalty has been prescribed as a punishment, not only under Penal Code, 1860, but even under special laws like the Protection of Children from Sexual Offences Act, 2012. Despite the challenge to the constitutional validity of Section 302 IPC, the Hon'ble Apex Court has upheld its

constitutional validity. Therefore, to listen to the abolitionists of death penalty is to waste ones time.

**76.** To kill is to be cruel and, therefore, all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist. The 'rarest of rare dictum' breathes life in "special reasons" under Section 354(3) of Cr.P.C. and entrenches the policy that life imprisonment is the rule and death punishment is an exception. It is a settled law of interpretation that exceptions are to be construed narrowly. That being the case, the 'rarest of rare' dictum places an extraordinary burden on the Court, in case it selects death punishment as the favoured penalty, to carry out an objective assessment of facts to satisfy the exceptions ingrained in the 'rarest of rare' dictum. A case, in order to belong to a 'rarest of rare' category, must conform to the highest standards of judicial rigor and thoroughness, as the said norm is an exceptionally narrow exception. A conclusion as to the rarest of rare aspect with respect to a matter shall entail identification of aggravating and mitigating circumstances, relating to both the 'crime' and the 'criminal'. The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the

exceptionally grave circumstances of the particular case relating to crime as well as the criminal. Thus, in essence, the 'rarest of rare' dictum imposes a wide-ranging embargo on awarding death punishment, which can only be revoked if the facts of the case successfully satisfy double qualification, i.e., (i) that the case belongs to rarest of rare category; and (ii) the alternative option of life imprisonment will just not suffice the facts of the case. Nevertheless, to impose or not to impose death penalty or is an existentialist question faced by the Courts. However, in a series of cases, the Hon'ble Apex Court has resolved this dilemma. Two of such cases, i.e., **Bachan Singh**'s case (11 supra) and **Machhi Singh**'s case (12 supra), which were decided as long back as in the years 1980 and 1983, still govern the field.

**77.** In **Bachan Singh**'s case (11 surpa), the Hon'ble Apex Court, while upholding the constitutional validity of death penalty in India, held that under Section 354(3) of Cr.P.C., imprisonment for life is the rule and death sentence is the exception. The Court held that it is not possible to lay down standards and norms for imposition of death penalty, as the degree of culpability cannot be measured in each case; Secondly, criminal cases cannot be categorised, there being infinite unpredictable and unforeseeable variations; Thirdly, on such categorisation, the sentencing process

will cease to be judicial; and Fourthly, such standardisation or sentencing discretion is a policy matter belonging to the legislature beyond the Court's function. The relevant discussion reads thus:

> "As we read Sections 354(3) and 235(2) and other related provisions of the 1973 Code, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the court must pay due regard, both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because "style is the man". In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist."

**78.** The Hon'ble Apex Court also emphasised the need for principled sentencing without completely trammelling the discretionary powers of the Judges. The Court also held that aggravating and mitigating circumstances would have to be viewed from the perspective of both the crime and the criminal. Therefore, the courts need to perform a balancing act between the aggravating and the mitigating circumstances surrounding a case, without fettering judicial discretion. The Hon'ble Apex Court has illustrated some of the aggravating circumstances such as (i) pre-planned manner of the execution of the crime; (ii) calculated cold-blooded murders; (iii) murders diabolically conceived and cruelly

executed; (iv) the weapon used and the manner of their use; and (v) the horrendous feature of the crime and the helpless state of the victim. However, the Hon'ble Apex Court has emphasised that the list of aggravating and mitigating circumstances provided in the said decision are not exhaustive and the scope of mitigating factors in death penalty must receive a liberal and expansive construction by the Courts. Paragraph 209 of the said judgment reads as follows:

> "209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. 'We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society.' Nonetheless, it cannot be overemphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

**79.** In the same decision, Quoting Dr. Chitale, the Hon'ble Apex Court has given illustrations for "the aggravating circumstances" as under:—

a) if the murder has been committed after previous planning and involves extreme brutality; or
b) if the murder involves exceptional depravity; or

c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -
   i. while such member or public servant was on duty; or
   ii. in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Cr. P. C, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

**80.** The Hon'ble Apex Court has illustrated as to what would be the "mitigating circumstances" which would be kept in mind as under:—

1) That the offence was committed under the influence of extreme mental or emotional disturbance.
2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.
5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
6) That the accused acted under the duress or domination of another person.
7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

**81.** Further, in **Machhi Singh**'s case (12 supra), the Hon'ble Apex Court held that when the murder is committed in an

extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community, it would be a rarest of rare cases. The Court summarised the findings in **Bachan Singh**'s case (11 supra) and held as follows:-

> "38. In this background the guidelines indicated in Bachan Singh case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case :
>
> (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".
>
> (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
>
> (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

**82.** Moreover, in the said case, the Hon'ble Apex Court had laid down five "tests" which should be applied while considering the possible imposition of the death penalty. They are as under:—

*1)* When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for

money or reward, or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course of betrayal of the mother land.

3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.
4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.
5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

**83.** The Hon'ble Apex Court had also opined that the court is required to take a holistic view while considering these factors, and should not choose merely one test to be applied while ignoring the other factors. The Hon'ble Apex Court had clearly opined that "*if upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test, for the rarest of the rare case, the circumstances of the case are such the death sentence is warranted, the court would proceed to do so".*

**84.** In **Shankar Kisanrao Khade Vs. State of Maharashtra**[28], the Hon'ble Apex Court looked at the manner in which the aggravating and mitigating circumstances are to be weighed and

[28] (2013) 5 SCC 546

how the 'rarest of rare test' is to be applied while awarding death sentence. It was held as follows:-

> "52. Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we have to apply, while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is, 100% and "criminal test" 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the "criminal test" may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R-R test). R-R test depends upon the perception of the society that is "society-centric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges."

**85.** In **Santosh Kumar Satishbhushan Bariyar Vs. State of Maharashtra**[29], the Hon'ble Apex Court held as follows:-

> "157. The doctrine of proportionality, which appears to be the premise whereupon the learned trial Judge as also the High Court laid its foundation for awarding death penalty on the appellant herein, provides for justifiable reasoning for awarding death penalty. However, while imposing any sentence on the accused the court must also keep in mind the doctrine of rehabilitation. This, considering Section 354(3) of the Code, is especially so in the cases where the court is to determine whether the case at hand falls within the rarest of the rare case.
>
> 158. The reasons assigned by the courts below, in our opinion, do not satisfy Bachan Singh test. Section 354(3) of the Code provides for an exception. General rule of doctrine of

[29] (2009) 6 SCC 498

> proportionality, therefore, would not apply. We must read the said provision in the light of Article 21 of the Constitution of India. Law laid down by Bachan Singh interpreting Section 354(3) of the Code should be taken to be a part of our constitutional scheme.
>
> 159. Although the Constitution Bench judgment of the Supreme Court in Bachan Singh did not lay down any guidelines on determining which cases fall within the "rarest of rare" category, yet the mitigating circumstances listed in and endorsed by the judgment give reform and rehabilitation great importance, even requiring the State to prove that this would not be possible, as a precondition before the court awarded a death sentence. We cannot therefore determine punishment on grounds of proportionality alone. There is nothing before us that shows that the appellant cannot reform and be rehabilitated.
>
> ***
>
> 162. Further indisputably, the manner and method of disposal of the dead body of the deceased was abhorrent and goes a long way in making the present case a most foul and despicable case of murder. However, we are of the opinion, that the mere mode of disposal of a dead body may not by itself be made the ground for inclusion of a case in the "rarest of rare" category for the purpose of imposition of the death sentence. It may have to be considered with several other factors."

**86.** In **Ajay Pandit Vs. State of Maharashtra**[30], the Hon'ble Apex Court held that awarding death sentence is an exception, not the rule, and only in the rarest of the rare cases, the Court should award death sentence. It was held as follows:-

> "47. Awarding death sentence is an exception, not the rule, and only in the rarest of rare cases, the court could award death sentence. The state of mind of a person awaiting death sentence and the state of mind of a person who has been awarded life sentence may not be the same mentally and psychologically. The court has got a duty and obligation to elicit relevant facts even if the accused has kept totally silent in such situations. In the instant case, the High Court has not addressed the issue in the correct perspective bearing in mind those relevant factors, while questioning the accused and, therefore, committed a gross error of procedure in not properly assimilating and understanding the purpose and object behind Section 235(2) CrPC."

[30] (2012) 8 SCC 43

**87.** In **Mohinder Singh Vs. State of Punjab**[31], the Hon'ble Apex Court held that when a case clearly falls within the ambit of "rarest of rare" and when the alternative option is unquestionably foreclosed, then only death penalty can be imposed. It was held as follows:-

> "22. The doctrine of "rarest of rare" confines two aspects and when both the aspects are satisfied only then the death penalty can be imposed. Firstly, the case must clearly fall within the ambit of "rarest of rare" and secondly, when the alternative option is unquestionably foreclosed. Bachan Singh suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose.
> 23. In life sentence, there is a possibility of achieving deterrence, rehabilitation and retribution in different degrees. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore, puts an end to anything to do with life. This is the big difference between two punishments. Thus, before imposing death penalty, it is imperative to consider the same. The "rarest of rare" dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment would be pointless and completely devoid of any reason in the facts and circumstances of the case. As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second aspect to the "rarest of rare" doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme."

**88.** In **Panchhi Vs. State of Uttar Pradesh**[32], the Hon'ble Apex Court held that brutality of the manner in which a murder was perpetrated may be a ground, but not the sole criterion for judging

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[31] (2013) 3 SCC 294
[32] (1998) 7 SCC 177

whether the case is one of the 'rarest of rare case'. It was observed as follows:-

> "20. … No doubt brutality looms large in the murders in this case particularly of the old and also the tender-aged child. It may be that the manner in which the killings were perpetrated may not by itself show any lighter side but that is not very peculiar or very special in these killings. Brutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the "rarest of rare cases" as indicated in Bachan Singh case."

**89.** There is a catena of judgments, wherein, the Hon'ble Apex Court took various factors into consideration *qua* the rule that life imprisonment is a rule and death sentence is an exception. To quote some:

**90.** In **Rajesh Kumar Vs. State**[33], the accused was convicted of assault and murder of two helpless children in the most gruesome manner. The Hon'ble Apex Court held that death sentence could not be inflicted, reiterating that life imprisonment was the rule and death sentence an exception, only to be imposed in the "rarest of rare cases" and for "special reasons" when there were no mitigating circumstances.

**91.** In **Bantu Vs. State of Madhya Pradesh**[34], the Hon'ble Apex Court found that there was nothing on record to indicate that the appellant had any criminal antecedents nor could it be said

[33] (2011) 13 SCC 706

that he would be a grave danger to the society at large, despite the fact that the crime committed by him was heinous. It was held as follows:-

> "8. However, the learned counsel for the appellant submitted that in any set of circumstances, this is not the rarest of the rare case where the accused is to be sentenced to death. He submitted that age of the accused on the relevant day was less than 22 years. It is his submission that even though the act is heinous, considering the fact that no injuries were found on the deceased, it is probable that death might have occurred because of gagging her mouth and nosetrix [nostril] by the accused at the time of incident so that she may not raise a hue and cry. The death, according to him, was accidental and an unintentional one. In the present case, there is nothing on record to indicate that the appellant was having any criminal record nor can it be said that he will be a grave danger to the society at large. It is true that his act is heinous and requires to be condemned but at the same time it cannot be said that it is the rarest of the rare case where the accused requires to be eliminated from the society. Hence, there is no justifiable reason to impose the death sentence."

**92.** In **Amit Vs. State of Maharashtra**[35], the Hon'ble Apex Court took into consideration the prior history of the appellant therein and noted that there was no record of any previous heinous crime and also there was no evidence that he would be a danger to society, if the death penalty was not awarded to him. The relevant finding is extracted below.

> "10. The next question is of the sentence. Considering that the appellant is a young man, at the time of the incident his age was about 20 years; he was a student; there is no record of any previous heinous crime and also there is no evidence that he will be a danger to the society, if the death penalty is not awarded. Though the offence committed by the appellant deserves severe condemnation and is a most heinous crime, but on cumulative facts and circumstances of the case, we do not think that the case falls in the category of rarest of the rare cases."

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[34] (2001) 9 SCC 615
[35] (2003) 8 SCC 93

**93.** In **Rahul Vs. State of Maharashtra**[36], the Hon'ble Apex Court noted that there was no adverse report about the conduct of the appellant therein, either by the jail authorities or by the probationary officer and that he had no previous criminal record or at least nothing was brought to the notice of the Court. It was observed as follows:-

> "4. We have considered all the relevant aspects of the case. It is true that the appellant committed a serious crime in a very ghastly manner but the fact that he was aged 24 years at the time of the crime, has to be taken note of. Even though, the appellant had been in custody since 27-11-1999 we are not furnished with any report regarding the appellant either by any probationary officer or by the jail authorities. The appellant had no previous criminal record, and nothing was brought to the notice of the Court. It cannot be said that he would be a menace to the society in future. Considering the age of the appellant and other circumstances, we do not think that the penalty of death be imposed on him."

**94.** In **Haru Ghosh Vs. State of West Bengal**[37], the Hon'ble Apex court commuted death sentence to life imprisonment in the case of a dastardly murder of two helpless persons for no fault of theirs. The Court, however, in commuting death sentence, took into consideration the following factors viz., (*i*) There was no pre-meditation on the part of the accused; (*ii*) The act was on the spur of the moment; (*iii*) The accused was not armed with any weapon; (*iv*) It was unknown under what circumstances the accused had

[36] (2005) 10 SCC 322
[37] (2009) 15 SCC 551

entered the house of the deceased and what prompted him to assault the boy; and (*v*) The cruel manner in which the murder was committed could not be the guiding factor and the accused himself had two minor children.

**95.** In **Accused 'X' Vs. State of Maharashtra**[38], the Hon'ble Apex Court has opined as follows:

> "It is established that sentencing is a socio-legal process wherein a judge finds an appropriate punishment for the accused considering factual circumstances and equities. Sentencing in India, is a midway between judicial intuition and strict application of rule of law. In light of the fact that the legislature provided for discretion to the Judges to give punishment, it becomes important to exercise the same in a principled manner. In India, sentencing is mostly led by "guideline judgments" in the death penalty context, while many other countries like United Kingdom and United States of America, provide a basic framework in sentencing guidelines. A strict fixed punishment approach in sentencing cannot be acceptable, as the Judge needs to have sufficient discretion as well".
>
> The Supreme Court may not lay down a "definitive sentencing policy", which is rather a legislative function. However, the courts in India have addressed this problem in a principled manner having regard to judicial standards and principles. These judicially set principles not only serve as instructive guidelines, but also preserve the required discretion of the trial Judges while sentencing. Such an effort has already been initiated by the Supreme Court, in Sunil Dutt Sharma, (2014) 4 SCC 375, when the sentencing guidelines evolved in the context of death penalty were applied to a lesser sentence as well. However, achieving sentencing uniformity may not only require judicial efforts, but even the legislature may be required to step in.
>
> In any case, considering that a large part of the exercise of sentencing discretion is principled, a Judge in India needs to keep in mind broad purposes of punishment, which are deterrence, incapacitation, rehabilitation, retribution and reparation (wherever applicable), unless particularly specified by the legislature as to the choice. The purposes identified above, mark a shift in law from crime-oriented sentencing to a holistic approach wherein the crime, criminal and victim have to be taken into consideration collectively.

[38] (2019) 7 SCC 1

**96.** Therefore, while choosing appropriate sentence to be awarded to an accused in a case, the above noted principles enunciated by the Hon'ble Apex Court have to be kept in mind.

**97.** Unfortunately, in the instant case, an innocent and helpless woman was gang raped by A1 to A3 and thereafter, mercilessly killed by slitting her throat with a knife. No doubt, the same is henious, which shocks the conscience of society. For, the loss of the deceased is irreparable to her husband and her children. Such persons, if not incapacitated, would continue to be threat to the society at large. Thus, the Court should fulfil the cry for justice of the family of the deceased and should also protect the society from such a looming danger. However, simultaneously, the Court should objectively weigh the evidence to see if the imposition of the death penalty is the only option for the Court, or a punishment can be chosen which would incapacitate the culprits, would deter others from committing such a crime in future, would permit the society to reform the culprit, and would still fulfill the need of justice of the society.

**98.** In the instant case, although a murder has been committed by A1 to A3, it appears to us that it was not a pre-planned murder. In fact, there is no evidence to show that A1 to A3 had a pre-

meditated mind to commit the murder of the deceased. The fact that A1 to A3 have followed the deceased till reaching an isolated area and pulled her towards the bushes and when A1 tried to commit rape on her and when the deceased raised cries, A1 to A3 dragged her into the bushes and committed rape on her forcibly, clearly indicates that A1 to A3 followed the deceased with an intention to satisfy their lust, i.e., to commit rape on her and not to commit her murder. Hence, the element of "pre-planning" is conspicuously missing in the instant case. Even according to prosecution, after committing rape on the deceased, the accused, apprehending that they would be in trouble if the deceased discloses the incident to someone, murdered the deceased. Hence, the intention of accused in committing the subject murder was to protect themselves from the consequences that would follow, in case the deceased discloses the incident to someone. Hence, their action cannot be categorised as "*extremely brutal*" or "*grotesque*" or "*diabolical*" or "*revolting*" or "*carried out in a dastardly manner so as to arouse intense and extreme indignation of the community*". Furthermore, the subject murder was neither "*murder by hired assassins for money or reward*" nor would *"arouse social wrath"*. It is neither "*enormous in proportion"* nor was *"committed in betrayal of mother land"*. Similarly, the

magnitude of the crime is limited to an individual and does not involve the *elimination of a family*, or a large number of persons of a particular community or locality. Thus, the case does not fulfil the tests prescribed in **Bachan Singh**'s case (11 supra) and **Machhi Singh**'s case (12 supra). Therefore, the case does not fall within the extreme category of "rarest of the rare".

**99.** Furthermore, admittedly A1 to A3 are middle aged persons, viz., 30, 40 and 35 years old as on the date of commission of the subject offence. Undoubtedly, they belong to a backward caste, i.e., BC-E Shaik Community. Undoubtedly, all of them were working as coolies, they are poor. In their examination under Section 313 of Cr.P.C., A1 stated that he has wife, four children and his mother; A2 stated that he has wife, four children and his parents; and A3 stated that he has wife, four children and old aged parents. Further, there is nothing on record to indicate that A1 to A3 were having past criminal record, nor it can be said that they would be a grave danger to the society at large. True it is, the offence committed by A1 to A3 is heinous and requires to be condemned, but at the same time, it cannot be said that it is a 'rarest of rare' case, where A1 to A3 should be altogether eliminated from the society.

**100.** Further, even though A1 to A3 are in custody since 27.11.2019, we are not furnished with any report by the jail authorities suggesting that A1 to A3 are beyond reformation. Hence, the prosecution has not produced any evidence to show that A1 to A3 are beyond reformation. Moreover, by asking to confirm the death sentence, the society and the State admit that they are incapable of reforming A1 to A3. The State and the society must try their level best to reform an accused. By throwing a young life into the mouth of death, the society and the State abdicate their primary duty to reform the offender. Hence, while awarding appropriate punishment to A1 to A3 for the subject offence committed by them, which is undoubtedly heinous, a via-media has to be discovered to reform them, so also to protect the society from them.

**101.** Section 302 of IPC merely prescribes either life imprisonment or death. However, keeping in mind the nuances and the varied circumstances of the case, the Hon'ble Apex Court has laid down other categories of punishment available to the Courts. Thus, presently, it is not only mere life imprisonment for fourteen years nor the extreme death penalty that can be imposed on an accused, but they are other categories of judicial sentencing.

In **Gurvail Singh @ Gala vs. State of Punjab**[39], the Hon'ble Apex Court held that although, in practical terms, life imprisonment means the imprisonment for fourteen years, but the same can be extended by judicial sentencing to thirty years, with or without parole. Moreover, in **Nand Kishore Vs. State of Madhya Pradesh**[40] the Hon'ble Apex Court held that an accused can be sentenced to imprisonment with or without the benefit of remission. Therefore, while imposing a punishment, the Court has four different options with regard to the punishment to be inflicted upon an accused convicted under Section 302 IPC. The two new terms of punishment prescribed by the Hon'ble Apex Court balance the conflict between the rights of the accused and cry for justice by the society. Furthermore, these two newly created options equally balance the reformative theory of punishment on one side, and of the right of the society to be protected from a potential menace. Hence, while selecting the punishment, the other options available between life imprisonment and death sentence, should also be considered by the Court. Furthermore, it may be beneficial for the criminal justice system to select a via-media between life and death, to incarcerate the accused either for thirty years without parole, or for the rest of his life without remission. By

[39] (2013) 2 SCC 713
[40] (2019) 16 SCC 278

selecting such a middle path, the criminal justice system acknowledges both the significance of a life and simultaneously protects the society from volatile and dangerous persons. Moreover, it gives a chance to the society and the State to try to reform an accused to the best of the ability of the society and the State. Neither the society, nor the State should readily admit that it has failed to reform a person. The endeavour of the society, and the State should be to recondition the psychology of an accused, and to make him a productive member of the society at large. Even while a prisoner is incarcerated, he can be reformed to the extent that he can be employed within the jail administration and can become a role model for the other under-trial convict prisoners. Further, the via-media also permits the Court to balance the twin aspects of Article 21 of the Constitution of India, viz., while it limits the personal liberty of the accused, it does not deprive the accused of his life. Therefore, such a term of punishment would, indeed, be in consonance with Article 21 of the Constitution of India – an Article which has been held to be the heart and soul of the Constitution of India.

**102.** In **Pappu**'s case (17 supra) relied by the learned Public Prosecutor, the appellant therein has been accused of enticing a seven year old girl to accompany him on the pretext of picking

lychee fruits; having thereafter committed rape upon the child; having caused her death; and having dumped the dead body near a bridge on the riverbank, after having dragged the dead body over a distance of one and one-quarter kilometres. The Hon'ble Apex Court, discussing the law governing imposition of capital punishment in great detail, commuted the death sentence awarded to the appellant therein for the offence under Section 302 IPC into that of imprisonment for life, with the stipulation that the appellant shall not be entitled to premature release or remission before undergoing actual imprisonment for a period of 30 (thirty) years.

**103.** In **Ravishankar**'s case (16 supra) relied by the learned Public Prosecutor, the appellant therein was convicted and sentenced to death for kidnapping a 13 year old girl, raping her and murdering her by throttling. However, the Hon'ble Apex Court modified the death sentence to life imprisonment for entire life without remission, by giving benefit of the mitigating circumstance of residual doubt.

**104.** In **Mahipal**'s case (15 supra) relied by the learned Public Prosecutor, the appellant therein was sentenced to death by the trial Court for the offence under Section 302 of IPC for causing death of two minor children for ransom. However, the High Court

acquitted the appellant of all the charges levelled against the appellant. The Hon'ble Apex Court reversed the judgment of the High Court but however, modified the death sentence imposed by the trial Court to that of life imprisonment.

**105.** In **Polepaka Praveen**'s case (14 supra) relied by the learned Public Prosecutor, the accused therein was charged with offences under Sections 302, 449, 376A, 376AB, 363, 379 of IPC, and under Sections 5(i) r/w Section 6 and 5(m) r/w Section 6 of the Protection of Children from Sexual Offences Act, 2012, for causing murder of a nine month old girl, after committing rape on her. The trial Court imposed death penalty. However, this Court, after drawing a balance-sheet of aggravating and mitigating circumstances, reduced the sentence for the offence under Section 302 IPC from one of capital punishment to life sentence, with the rider that the appellant shall not be granted any remission and shall not be released till his last breath.

**106.** In view of the foregoing discussion, we are of the view that the trial Court is not justified in awarding death sentence to A1 to A3 in the facts and circumstances of the case treating this case as a 'rarest of rare' case. Considering the overall aggravating and mitigating circumstances, we are of the view that sentencing A1 to

A3 to undergo life imprisonment with a rider to remain in custody till their last breath, without remission, would be an appropriate sentence in the present case. We, accordingly, pass the following order.

1. ***The conviction of A1 to A3 of the offences under Sections 302 r/w 34 of IPC and r/w Section 3(2)(v) of SCs/STs (POA) Amendment Act, 2015, 376-D r/w 34 of IPC and r/w Section 3(2)(v) of SCs/STs (POA) Amendment Act, 2015 and Section 3(1)(w)(i) of SCs/STs (POA) Amendment Act, 2015; and the conviction of A2 and A3 of the offence under Section 404 r/w 34 of IPC, are maintained.***

2. ***The sentence of death penalty awarded by the trial Court to A1 to A3 of the offence under Section 302 of IPC is commuted to imprisonment for life, with a rider that A1 to A3 shall remain in custody till their last breath, without remission.***

3. ***The other sentences imposed by the trial Court for the other offences mentioned hereinabove are maintained.***

4. ***The fine amount of Rs.26,000/- imposed by the trial Court and the default sentences are also maintained.***

5. ***All the sentences shall run concurrently.***

6. ***The Criminal Appeal filed by A1 to A3 is partly allowed to the extent indicated above.***

7. ***The Referred Trial is answered accordingly.***

Miscellaneous petitions, if any, pending in Criminal Appeal No.293 of 2020 shall stand closed.

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**JUSTICE P.NAVEEN RAO**

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**JUSTICE JUVVADI SRIDEVI**

28th April, 2023

**Note**:-

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